165-719

165-719

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~998~~ 512

THE HURLBUT LAND AND CATTLE COMPANY (A CORPORATION), APPELLANT,

vs.

JOHN S. TRUSCOTT, COUNTY TREASURER OF CUSTER COUNTY, MONTANA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 5, 1896.

(16,288.)

(16,288.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 998.

THE HURLBUT LAND AND CATTLE COMPANY (A CORPORATION), APPELLANT,

vs.

JOHN S. TRUSCOTT, COUNTY TREASURER OF CUSTER COUNTY, MONTANA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND AND CATTLE COMPANY (a Corporation), Appellee.
No. 250.

Transcript of Record.

Appeal from the circuit court of the United States, district of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,
vs.
JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

Caption.

Be it remembered, that the complainant above named filed its bill of complaint herein on the 23rd day of July, 1895, which said bill of complaint is in the words and figures as follows, to wit:

Circuit Court of the United States in and for the District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,
vs.
JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

Bill of Complaint.

To the judges of the circuit court of the United States for the district of Montana:

2 The Hurlburt Land and Cattle Company, a corporation duly organized and existing under the laws of the State of Illinois, and a citizen of said State, and having its principal place of business therein, brings this, *his* bill of complaint, against John S. Truscott, a citizen of the State of Montana, and county treasurer of Custer county, in said State of Montana, and an inhabitant of said district of Montana.

And thereupon your orator complains and says:

First. That your orator, The Hurlbut Land and Cattle Company, was at all the times hereinafter mentioned and now is a corporation duly organized and existing under the laws of the State of Illinois, and having its chief and principal place of business therein.

Second. That the defendant, John S. Truscott, is a citizen of the State of Montana, and that for the past six months has been and now is the duly elected, qualified and acting treasurer of the county of Custer, in said State of Montana, and is an inhabitant of said district of Montana.

Third. The bill of complaint is brought, and this suit instituted on behalf of the complainant and all others, who, during the years 1890, 1892, 1893, and 1894, or any of said years, were assessed by the assessor of Custer county, Montana, upon cattle and live stock grazing on the Crow Indian reservation, for State and county taxes or any taxes whatever, now unpaid, and who shall in due time come in and seek relief by, and contribute to the expenses of this suit.

Fourth. That this complainant, during the five years last past, has owned and now owns a large number of cattle, during
3 all that time and now, grazing on the Crow Indian reservation, which said reservation is situated within the exterior limits of the State of Montana.

That in the years 1890 and 1894 said cattle were listed and the complainant was assessed and taxed therefor in the county of Custer, in said State of Montana, by the assessor and the authorities of said county, which said listing assessment and taxation were contrary to and without authority of law.

That the said Crow Indian reservation is within the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of the State of Montana or of the said county of Custer.

That the taxes so illegally assessed by the assessor and the authorities of said county of Custer against the complainant were the sum of $3,237.53 in the year 1890, and the sum of $2,701.33 in the year 1894, and no assessment was made against this complainant on account of cattle grazing on said Crow Indian reservation for and during the years 1891, 1892, and 1893.

Fifth. That there are more than one hundred owners of cattle which are now, and for the past five years have been, grazing on said Crow Indian reservation, the owners of which cattle, while such cattle were grazing on said reservation, have heretofore, in *in* the years 1890, 1892, 1893, and 1894, or in some of such years, been illegally assessed for State and county taxes, on account of such cattle so grazing as aforesaid, by the assessor and authorities of said county of Custer, and the taxes so illegally assessed have not been paid or collected, and the cattle so assessed were owned by persons,
4 among whom was this complainant, who were not then and are not now residents of said county of Custer.

Sixth. That no claim for taxes assessed against the complainant, or against any of the owners of cattle, now or heretofore grazing on said Crow Indian reservation, is made by the defendant, or by au-

thorities of said county of Custer, except for taxes illegally assessed on account of cattle lawfully grazing upon said reservation.

That in the year 1890 and 1894 this complainant had about five thousand head of cattle lawfully grazing on said Crow Indian reservation, which cattle were worth about twenty dollars per head, and that complainant has now more than five thousand head of cattle lawfully grazing upon said reservation, which cattle are worth something more than twenty dollars per head; that complainant has and has had no cattle on said reservation except such as were permitted to be and to graze thereon pursuant to the terms of leases authorized by the United States as hereinafter mentioned.

That the cattle of complainant and others, which cattle are now lawfully grazing on said reservation, number more than thirty thousand head and are worth more than the sum of twenty dollars per head, and the owners of said cattle have a common interest in resisting the unlawful seizure and sale of said cattle, which is now threatened by defendant as hereafter set forth.

That some of said cattle of complainant, and of said others owner-, being about one-fifth of the number of said cattle, are now nearly ready for market, and will be marketable as beef cattle during the present year; that the remainder of said cattle are a mixed lot of different ages and quality and unmarketable, and will have to be grazed another year in order that any income may be derived therefrom.

That the rounding up of said cattle now marketable, or nearly so, as beef cattle, and driving them from the said reservation, would cause a deterioration in the value of said cattle of about two dollars per head, and by such rounding up and driving, and the disturbance of all the cattle on said reservation caused thereby, all the cattle on said reservation would be injured and damaged to the extent of about two dollars per head.

The amount of injury and damage done to said cattle by rounding them up, and driving and selling part of them as threatened by defendant, as hereinafter set forth, would be very great, but the amount of such injury would and could not be precisely or even approximately ascertainable in an action at law.

That none of such cattle are now in such salable condition as to bring their full value at a forced sale.

That the statutes of Montana would and do afford no remedy to complainant, or to others similarly situated, for the said rounding up, driving, disturbing, and selling said cattle, so threatened to be done by defendant as in this bill of complaint set forth.

That on account of disturbing, rounding up, seizing and selling said cattle, or a part thereof, as threatened by said defendant, the cost, expense, and damage to complainant and other owners of cattle lawfully grazing on said reservation, in guarding, superintending, properly placing and quieting the said cattle not sold by defendant would amount to about two dollars per head as aforesaid, for which injury and damage this complainant and others similarly situated would have no remedy at law.

That the said cattle heretofore and now grazing on said Crow In-

dian reservation were and are grazing on lands and only upon lands owned and held by said Crow Indians as a tribe, and the said Crow Indians as a tribe have consented and now consent to such grazing and to the leases and contracts by the United States authorities to and with said complainant and others for such grazing.

Seventh. That the amount of taxes now sought to be collected by the defendant, as treasurer of the said county of Custer, by the seizure and sale of cattle lawfully grazing upon said reservation, including the said cattle of complainant, is about $110,000.00, all of which amount was illegally assessed by the assessor and authorities of said county of Custer in the years 1890, 1892, 1893 and 1894 upon the owners of cattle, on account of and for cattle then lawfully grazing on said reservation.

That the cattle so illegally assessed against the owners thereof, as aforesaid, on said Crow Indian reservation, which said cattle defendant now threatens illegally to seize and sell for taxes were at the times of such illegal assessments, and are now, grazing on said reservation under leases authorized by the laws of the United States, which leases were made by the Indian agent upon said reservation and duly ratified by the Secretary of the Interior and the Commissioner of Indian Affairs, with the consent of the Indians upon
7 said reservation, and that the money paid upon said leases was paid for the benefit of said Indians and to them as a tribe.

Eighth. That heretofore no effort has been made by the treasurer of said Custer county, who is the collector of State and county taxes in and for said county, to collect said taxes so illegally assessed as aforesaid, beyond the simple making of a demand therefor until the 15th day of July, 1895, on which day the board of county commissioners of said county of Custer, at a meeting of the said board, without any right or authority of law, directed the defendant John S. Truscott to go upon said Crow Indian reservation and to round up, seize and take from said reservation and sell the cattle and live stock of the complainant, and of the other owners of cattle hereinbefore referred to, which said cattle and live stock are now, and for a long time have been, lawfully grazing upon said Crow Indian reservation, and to collect said illegal taxes from and by a sale thereof outside of said reservation.

Ninth. That defendant has heretofore, at divers times and repeatedly, threatened to go upon said Crow Indian reservation, taking with him a strong force of men, and there round up and seize the cattle of this complainant and others and drive the cattle there lawfully grazing and so seized from the said reservation, and sell them for the purpose of collecting the taxes so unlawfully assessed as aforesaid.

Tenth. That on the 17th day of July, 1895, at Miles City, in said county of Custer, the defendant, who is duly elected, qualified and acting county treasurer of said county of Custer, told O. F. Goddard, of Billings, Yellowstone county, Montana, that on that day
8 he, the defendant, had sent seven men to said Crow Indian reservation to round up and seize the cattle of said complainant, and of others whose cattle were then lawfully grazing on said

reservation, and said defendant then and there mentioned to said Goddard the names of the men so sent by him, the defendant, to round up and seize said cattle, and that said defendant, on said 17th day of July, 1895, at said Miles City, further told and said to said O. F. Goddard that he, the defendant, should be on said reservation on Monday, the 22nd day of July, 1895, and should then take the cattle of said Hurlburt Land and Cattle Company, and of all others who had been assessed in said county of Custer for cattle upon said reservation (upon which assessments the taxes had not been paid) then and thereafter rounded up and gathered together on said reservation, and drive the said cattle from said reservation and sell them in said county of Custer, for the purpose of collecting from the sale thereof the taxes so illegally assessed.

Eleventh. That complainant has reason to believe and does believe that the defendant intends to and will carry into execution and effect the threats made by him, and hereinbefore set forth in reference to the seizure and sale of said cattle and live stock, unless restrained by an order of this court, and that unless restrained by an order and injunction from this court the said defendant will unlawfully go upon said reservation and there forcibly and unlawfully seize the cattle there lawfully grazing of this complainant and others and drive them from said reservation and sell them, for the purpose of collecting the taxes so illegally assessed.

9 Twelfth. That to round up the cattle on said Crow Indian reservation at this season of the year would be productive of great injury and irreparable damage to the several herds, and to all of the cattle on said reservation, and that to round up at any time of the year would cause great and irreparable injury and damage to the owners of said cattle.

That to seize and drive away from said reservation and sell said cattle now on said reservation, as threatened by said defendant, would cause irreparable damage and injury to the complainant and to the several owners of said cattle, for which damage and injury there would be no adequate remedy at law, and would also give rise to a multiplicity of suits.

Thirteenth. That this complainant has brought this bill of complaint and this suit at the earliest practicable moment after learning of the statements and threats made by said defendant on the 17th day of July, 1895, as hereinbefore set forth, and at the earliest moment since complainant has had reason to believe that the said threats to seize said cattle of complainant would be carried into execution.

Fourteenth. That the amount in controversy in this cause exceeds the sum of five thousand dollars.

In consideration whereof, and forasmuch as your orator has no adequate remedy at law in the premises, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, and to the end that your orator may obtain the relief to which he is justly entitled in the premises, he now prays the court:

10 1. That this court will grant to him due process by subpœna directed to said John S. Truscott, treasurer of Custer county, Montana, the defendant hereinbefore named, requiring and commanding him to appear herein and answer, on a certain day and under a certain penalty, but not under oath, the same being hereby expressly waived, the several allegations in this, your orator's bill, contained.

2. That this court may grant a writ of injunction, issued out of and under seal of this honorable court, perpetually enjoining and restraining the defendant, John S. Truscott, whether as county treasurer of Custer county, Montana, or individually or otherwise, his attorneys and agents, servants, employees, deputies and assistants, from going upon said Crow Indian reservation for the purpose of rounding up, seizing or driving away any of the cattle of complainant or others, and also from seizing or driving away from said reservation any of such cattle, and from interfering with such cattle in any manner whatever, and from holding, keeping, selling or in any manner disposing of or interfer*fer*ing with said cattle or any of them, if any of said cattle shall have been driven or removed from said reservation by defendant or his attorneys, agents, servants, employees, deputies or assistants, except to return the said cattle so removed, and any and all of them, to said reservation.

3. That a provisional or preliminary injunction be issued enjoins ing and restraining the said defendant, both individually and a-said county treasurer and his attorneys, agents, servants, employees, deputies and assistants, from in any manner interfering with

11 said cattle, and from doing any of the acts or things during the pendency of this cause, to enjoin and restrain them from doing which acts or things a perpetual injunction is prayed for in this bill of complaint.

4. That your honors may grant an order restraining the acts and things hereby sought to be enjoined until a decision upon the motion for a preliminary injunction, notice of which motion to be served with such restraining order, and that such order may be granted without security.

5. That your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to your honors may seem meet.

O. F. GODDARD,
STEPHEN CARPENTER,
B. P. CARPENTER,
Solicitors for Complainant.

O. F. GODDARD,
Post-office, Billings, Montana;
STEPHEN CARPENTER,
Post-office, Helena, Montana;
B. P. CARPENTER,
Post-office, Helena, Montana;
Of Counsel.

Affidavit of B. P. Carpenter.

UNITED STATES OF AMERICA,
District of Montana,
County of Lewis and Clarke, } ss:

B. P. Carpenter, being duly sworn, deposes and says that he is one of the solicitors and of counsel for the above-named complainant; that he resides in the city of Helena, in the said State, district and county; that he has read the foregoing complaint and
12 that the facts stated and alleged therein are true, to his best knowledge, information and belief. Deponent further says that he has made this affidavit of verification because the complainant and each and every officer of complainant is without and not within the said State, district or county.

B. P. CARPENTER.

Subscribed and sworn to before me this 22nd day of July, 1895.

[NOTARIAL SEAL.] STEPHEN CARPENTER,
Notary Public in and for said County and State.

Title of court and cause. Bill of complaint. Filed July 23rd, 1895. Geo. W. Sproule, clerk.

Affidavit of O. F. Goddard.

And on said date the affidavit of O. F. Goddard was filed herein, which said affidavit is in the words and figures as follows, to wit:

Circuit Court of the United States, District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainants,
vs.
JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

UNITED STATES OF AMERICA,
State of Montana, District of Montana,
County of Lewis and Clarke, } ss:

O. F. Goddard, being duly sworn, deposes and says, that
13 he is a citizen of the United States and of the State of Montana; that he resides at Billings, in the county of Yellowstone in said State, and that he is a solicitor and counsellor of the United States circuit court in and for said district, and solicitor and of counsel for the said Hurlbut Land and Cattle Company.

That the said Hurlbut Land and Cattle Company, as deponent is

informed and believes, is a corporation duly organized and existing and doing business under the laws of the State of Illinois, and that its chief and principal place of business is in Chicago, in said last-mentioned State.

That the said Hurlbut Land and Cattle Company, as deponent is informed and believes, during the five years last past has owned and now owns about five thousand cattle during all that time and now grazing on the Crow Indian reservation, which said reservation is situated within the exterior boundaries of the State of Montana. That in the years 1890 and 1894 said cattle were listed and the company assessed and taxed therefor in the county of Custer in said State, by the assessor of said county, which said listing, assessment and taxation were contrary to and without authority of law.

That the said Crow Indian reservation is within the sole and exclusive jurisdiction of the United States and out of the jurisdiction of the State of Montana or the said county of Custer.

That the taxes so illegally assessed by the assessor of said county of Custer against the said Hurlbut Land and Cattle Company, were the sum of $3,237.53 in the year 1890, and the sum of $2,701.33 in the year 1894.

14 That deponent is informed and believes that heretofore no effort has been made to collect said taxes, so illegally assessed as aforesaid, beyond the simple making of a demand therefor, until on or about the 15th day of July, 1895, on which day the board of county commissioners of said county of Custer, at a meeting of said board, directed John S. Truscott, the county treasurer of said county of Custer, to round up, seize and sell the cattle and live stock of the said Hurlbut Land and Cattle Company, which said cattle and live stock are now, and for a long time have been, lawfully grazing upon said Crow Indian reservation, and to collect said illegal tax from a sale thereof outside of said reservation.

That in the years 1890 and 1894, this complainant had about five thousand head of cattle lawfully grazing on said Crow Indian reservation, which cattle were worth about twenty dollars per head, and that complainant now has more than five thousand head of cattle lawfully grazing upon said reservation, which cattle are worth something more than twenty dollars per head; that complainant has and has had no cattle on said reservation except such as were permitted to be and to graze thereon, pursuant to the terms of leases authorized by the United States, as hereinafter mentioned.

That the cattle of complainant and others, which cattle are now lawfully grazing on said reservation, number more than thirty thousand head, and are worth more than the sum of twenty dollars per head, and the owners of said cattle have a common interest in resisting the unlawful seizure and sale of said cattle, which is now threatened by defendant, as hereafter set forth.

15 That some of said cattle of complainant, and of said other owners, being about one-fifth of the number of said cattle, are now nearly ready for market, and will be marketable as beef cattle during the present year; that the remainder of said cattle are a mixed lot of different ages and quality and unmarketable, and

will have to be grazed another year in order that any income may be derived therefrom.

That the rounding up of said cattle now marketable, or nearly so, as beef cattle, and driving them from the said reservation, would cause a deterioration in the value of said cattle of about two dollars per head, and by such rounding up and driving and the disturbance of all the cattle on said reservation caused thereby, all the cattle on said reservation would be injured and damaged to the extent of about two dollars per head.

The amount of injury and damage done to said cattle by rounding them up and driving and selling part of them, as threatened by defendant, as hereinafter set forth, would be very great, but the amount of such injury would and could not be precisely or even approximately ascertainable in an action at law.

That none of such cattle are now in such saleable condition as to bring their full value at a forced sale.

That the statutes of Montana would and do afford no remedy to complainant, or to others similarly situated, for the said rounding up, driving, disturbing and selling said cattle, so threatened to be done by defendant, as in this affidavit set forth.

That on account of disturbing, rounding up, seizing and selling said cattle or a part thereof, as threatened by said defendant,
16 the cost, expense and damage to complainant and other owners of cattle lawfully grazing on said reservation, in guarding, superintending, properly placing and quieting the said cattle not sold by defendant, would amount to about two dollars per head as aforesaid, for which injury and damage this complainant, and others similarly situated, would have no remedy at law.

That the said cattle heretofore and now grazing on said Crow Indian reservation, were and are grazing upon lands, and only upon lands, owned and held by said Crow Indians as a tribe, and the said Crow Indians, as a tribe, have consented and now consent to such grazing and to the leases and contracts by the United States authorities to and with said complainant and others for such grazing.

That this deponent is well acquainted with said John S. Truscott, who is the duly elected, qualified and acting county treasurer of said county of Custer, and that on the 17th day of July, 1895, at Miles City, in said county of Custer, the said John S. Truscott told this deponent that on that day he had sent seven men to said Crow Indian reservation to round up and seize the cattle of said Hurlbut Land and Cattle Company, and of others whose cattle were then grazing on said reservation.

That said Truscott informed deponent that the names of the men so sent by him to round up and seize said cattle are as follows, to wit: William Hawkins, deputy sheriff of Custer county; Harry Loomis, John Steiner, Joseph Darcy, John Darcy, Samuel B. Thurman and William Dominy.

17 That said Truscott, on said 17th day of July, 1895, at said Miles City, further told this deponent that he (Truscott) should be on said reservation on Monday, the 22nd day of July, 1895, and should then take the cattle of said Hurlbut Land and

Cattle Company, and of all others who had been assessed in said county of Custer for cattle on said reservation (upon which assessments the taxes had not been paid) then and thereafter rounded up and gathered together on said reservation, and drive the said cattle from said reservation and sell them in said county of Custer, for the purpose of collecting from the sale thereof the taxes so illegally assessed.

That there are more than one hundred owners of cattle and live stock now grazing on said Crow Indian reservation, which cattle and live stock, while grazing on said reservation, have heretofore, in the years 1890, 1892, 1893 and 1894, been listed and illegally assessed for State and county taxes by the assessor of said county of Custer, and the taxes so illegally assessed have not been paid, and the cattle and live stock so assessed were, as this deponent is informed and believes, owned by persons who were not residents of said county of Custer; and said Truscott told this deponent, on said 17th day of July, 1895, that he should seize and sell enough cattle and live stock grazing on said reservation to collect from the sale thereof all of the taxes that had been assessed in the said county of Custer against the owners of said cattle and live stock on account thereof.

That no claim for taxes against the Hurlbut Land and Cattle Company is made by the said treasurer of Custer county, or
18 by said county of Custer, except for taxes illegally assessed on account of cattle and live stock lawfully grazing upon said reservation.

That the amount of taxes now sought to be collected by the said treasurer of said county of Custer by the seizure and sale of cattle and live stock lawfully grazing upon said reservation, is about $110,000.00, all of which amount *is* illegally assessed by the assessor of said county of Custer in the years 1890, 1892, 1893 and 1894, upon the owners of cattle and live stock, on account of cattle and live stock then lawfully grazing on said reservation.

That the cattle and live stock so illegally assessed, as aforesaid, on said Crow Indian reservation, which said cattle and live stock said treasurer of said county of Custer now threatens illegally to seize and sell for taxes, were at the time of such illegal assessment and are now grazing on said reservation under leases authorized by the laws of the United States, which leases were made by the Indian agent upon said reservation and ratified by the Secretary of the Interior, with the consent of the Indians upon said reservation, and that the money paid for said leases was paid for the benefit of said Indians.

That to round up the cattle on said Crow Indian reservation at this season of the year would be productive of great injury and damage to the several herds and to all of the cattle on said reservation.

That to seize and sell said cattle, as threatened by said county treasurer, would cause irreparable damage and injury to the several owners thereof, for which there would be no adequate remedy at law, and a multiplicity of suits would be caused thereby.

19 That deponent believes that said county treasurer intends to, and will carry into execution and effect the threats made by him, as hereinbefore set forth, in reference to the seizure and sale of said cattle and live stock, unless restrained by an order of this court.

Deponent further says that this affidavit is made by him because none of the officers of the said Hurlbut Land and Cattle Company are in the State of Montana.

O. F. GODDARD.

Subscribed and sworn to before me this 19th day of July, 1895.

[SEAL.] STEPHEN CARPENTER,
Notary Public in and for said County and State.

[Endorsed:] Title of court and cause. Affidavit of O. F. Goddard. Filed July 23, 1895. Geo. W. Sproule, clerk.

And on the 23rd day of July, 1895, a restraining order was duly issued herein, which said order is in the words and figures as follows, to wit:

Circuit Court of the United States in and for the District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,
vs.
JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

20 *Order to Show Cause and Restraining Order.*

Upon reading and filing the bill of complaint herein and the affidavit of O. F. Goddard, and on motion of O. F. Goddard, Stephen Carpenter and B. P. Carpenter, solicitors for the complainant, it is hereby ordered this 23rd day of July, 1895, that the defendant show cause, if any he has, before said court at the United States court-room, in the city of Helena, State of Montana, district of Montana, on the 29th day of July, 1895, at ten o'clock, a. m., or as soon thereafter as counsel can be heard, why the preliminary injunction should not issue pursuant to the prayer of said bill.

It appearing from the said bill of complaint that there is danger of irreparable injury from delay, now, therefore, you, the said John S. Truscott, county treasurer of Custer county, Montana, your attorneys, agents, servants, employees, deputies and assistants, are strictly commanded and enjoined upon the pains and penalties which may fall upon you and each of you in case of disobedience, that you forthwith and until the decision of the motion upon the order to show cause why a preliminary injunction should not be granted in this suit, a copy of which order is herewith served upon you, and until the further order of this court, desist and refrain

from doing or causing or permitting to be done any of the acts or things sought to be enjoined by said bill of complaint.

It is further ordered that a copy of said bill of complaint, and of said affidavit of O. F. Goddard, be served upon said defendant with this order to show cause, and this temporary restraining order.

And it is further ordered that such service upon defend-
21 ant be made at least three days before the day appointed in said order to show cause for the hearing of the motion for a preliminary injunction.

At chambers, Helena, Montana, July 23rd, 1895.

HIRAM KNOWLES,
U. S. District Judge.

(Endorsed:) Title of court and cause. Order to show cause. Filed and entered July 23, 1895. Geo. W. Sproule, clerk.

Also endorsed thereon the return of the United States marshal as to service thereof as follows, to wit:

I hereby certify that I received the within order at Helena, July 23rd, 1895, and served the same by leaving with J. S. Truscott, treasurer of Custer county, Montana, a copy, together with a copy of the bill of complaint and the affidavit of O. F. Goddard, attached at Bull Mountain, Montana, July 24th, 1895.

WM. McDERMOTT,
U. S. Marshal,
By T. J. DAVIDSON, *Deputy.*

This 25th day of July, 1895.

And on the 23rd day of July, 1895, a subpœna in equity was duly issued herein, which said subpœna in equity is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

22 *Subpœna in Equity.*

The President of the United States of America, greeting, to John S. Truscott, treasurer of Custer county, Montana:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room thereof in Helena, on the 2nd day of September, A. D. 1895, to answer a bill of complaint exhibited against you in said court by the Hurlbut Land and Cattle Company, a corporation duly organized and existing under the laws of the State of Illinois, who is a citizen of the State of Illinois, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 23rd day of July, in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the 120th.

[SEAL.] GEO. W. SPROULE, *Clerk*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of September next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

[SEAL.] GEO. W. SPROULE, *Clerk*.

23 (Endorsed:) Title of court and cause. Subpœna. Filed July 25th, 1895. Geo. W. Sproule, clerk.

Also endorsed with return of U. S. marshal, as follows:

UNITED STATES MARSHAL'S OFFICE,
District of Montana.

I hereby certify that I received the within writ on the 23rd day of July, 1895, and personally served the same on the 24th day of July, 1895, by delivering to and leaving with J. S. Truscott, treasurer of Custer county, Montana, said defendant named therein, personally at Bull Mountain, county of Custer, in said district, an attached copy thereof.

WM. McDERMOTT,
U. S. Marshal,
By T. J. DAVIDSON, *Deputy.*

And thereafter, to wit, on the 30th day of July, 1895, the defendant herein appeared in said cause and filed an answer, which said answer so filed is in the words and figures as follows, to wit:

Circuit Court of the United States in and for the District of Montana, Ninth Circuit. In Equity.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainants,

vs.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

24 *Answer to Bill of Complaint.*

John S. Truscott, the defendant named in the bill of complaint in this action, for answer thereto alleges:

I.

The defendant has no knowledge or information sufficient to form a belief as to whether the complainant is a corporation either organ-

ized or existing under the laws of the State of Illinois, or whether the complainant has its principal place of business in the said State.

II.

Admits that he is a citizen of the State of Montana, and that he is treasurer of the county of Custer, as in the bill of complaint alleged.

III.

Admits that the complainant did own and now owns cattle, as in the bill of complaint alleged.

Admits that in the years 1890 and 1894 the cattle were listed, and the complainant assessed therefor in the county of Custer, State of Montana, by the authorities of Custer county; but denies that such listing and taxation were either contrary to, or without the authority of law.

Denies that the Crow Indian reservation is within the sole and exclusive jurisdiction of the United States, or that the same is out of the jurisdiction of the State of Montana, or of the county of Custer.

Admits that the taxes of complainant for 1890 were $3,237.53, and for 1894 $2,701.33.

IV.

25 Admits that there are more than one hundred owners of cattle which are now, and for the past five years have been grazing cattle on the Crow Indian reservation; but denies that the said owners, or any of them, for the years 1890, 1892, 1893 and 1894 have been by the authorities of Custer county illegally assessed for State and county taxes on account of such cattle so grazing on the said reservation; but alleges on information and belief, that all assessments made against owners of cattle on said reservation in all the years in which such assessments have been made, and which this defendant now seeks to collect, were wholly legal and just and according to law.

Admits that the taxes so assessed have not been paid or collected, but denies that the said cattle so assessed were owned, except in a small part, by persons who are not residents of the county of Custer and State of Montana.

V.

Admits that the claim for taxes made against complainant, and all others assessed on said reservation is for taxes assessed upon stock grazing upon the Crow Indian reservation, but denies that such assessments were illegal.

VI.

Admits that the amount now sought to be collected by this defendant as taxes due from persons grazing cattle on said reservation and for cattle assessed on said reservation is $110,000.00 and more; but denies that the said amount, or any part thereof, was illegally

assessed by the assessor, or by the authorities of Custer county in the years 1890, 1892, 1893 and 1894; but alleges that a part
26 of said taxes now sought to be collected is for the year 1889 as well as for the years 1890, 1892, 1893 and 1894, and that the taxes for each and every of said years were legally assessed; but on information and belief defendant denies that the said cattle were grazing upon said reservation under leases authorized by the United States, made and ratified by the Secretary of the Interior and the Commissioner of Indian Affairs, with the consent of the Indians upon said reservation.

In relation thereto, defendant alleges on information and belief, that a small number of the persons against whom taxes were assessed for cattle grazing upon the said reservation, but just what number defendant does not know, and has no means of informing himself, had such leases as in the complaint alleged, and on information and belief alleges that such leases as do exist, have only been for the past three or four years, and not for a longer time than that; and whether the moneys arising from said leases have been paid for the benefit of the Indians, and to them, this defendant has no knowledge or information sufficient to form a belief.

But in relation to the assessments complained of by complainant in this action, defendant alleges upon his information and belief that for all the years for which taxes are now claimed for property assessed on said reservation, such taxes were legally assessed by the authorities of Custer county in each and every one of said years, which said assessments are now sought to be collected by this defendant.

VII.

Defendant denies that no effort has been made by the au-
27 thorities of Custer county to collect the taxes due from persons grazing cattle upon said reservation, except a simple demand, but in relation thereto alleges that the various assessors of the said county of Custer have, in all the years when assessments were made against property on the said reservation, demanded payment of such taxes in the manner prescribed by law.

That in addition to such demand, in the year 1893, the treasurer of said county, with a force of men to assist him in the execution of his duty, went upon the said reservation with such assistants to seize property to enforce the collection of such taxes, and for which payment had been refused; that the persons so sought to be collected from, by armed combination and force between themselves and their servants and employees, assisted by the Indians upon the reservation, drove the said treasurer, his deputies and assistants, from the said reservation, threatening their lives if they continued in the matter of so collecting the said taxes.

That the said treasurer, in order to prevent bloodshed, and to avoid hazard to the lives of those assisting him, did desist from such attempt; that subsequently he went into the courts of the State to seek judgment for such taxes; that such action was removed on the application of the persons so sought to be collected

from from the said court to this circuit court; that said action is now pending and undetermined in this court where this present action is brought.

Denies that on the 15th of July, 1895, or at any other time or at all, the board of commissioners of Custer county, without authority of law, directed this defendant to go upon the Crow reservation and drive from said reservation, and seize and sell the stock of complainant and others; in relation thereto defendant alleges:

28

That on the 15th of July, 1895, he was in consultation with the board of commissioners of said county in relation to the collection of taxes claimed by the said county from persons and corporations having property assessed upon the Crow Indian reservation.

That the said board of commissioners did advise this defendant, as did the county attorney of said county, and other legal advisers of said county, that it was his duty to collect taxes from persons assessed upon the said reservation, the same as from all other persons and property assessed in said county.

VIII.

Admits that he has stated (not threatened) that he would go upon said reservation and seize cattle on the said reservation and sell the same for the purpose of collecting taxes assessed against such property upon said reservation; but in relation thereto defendant alleges:

That it is his purpose, in case said taxes are not paid and he is not restrained by any lawful authority, to go upon the said reservation to round up and sell in the most convenient and proper place, as required by law, sufficient of the property of the several owners against whom assessments have been made for property on said reservation, to make the taxes so assessed against the property on the said Crow reservation.

But denies that he has threatened this in a spirit of lawlessness, as in the complaint intimated and alleged, but simply and only has stated that he would do this for the reason that, as he is advised by those whose duty it is to give him legal advice in the premises, it is his duty, under his oath and bond as treasurer and collector of taxes of said county, to collect taxes by destraint of property upon the reservation, in cases where taxes are not paid, the same as he does and is required to do with all other persons and delinquent tax-payers in said county; but denies that he has threatened to drive such cattle from the reservation, but alleges that he is intending to make the taxes from the same as hereinbefore alleged.

29

IX.

Admits all the allegation in the tenth subdivision of complainant's complaint, except he denies that he told said Goddard that he should drive the cat- from the said reservation and sell them, or that he should in any way attempt to collect taxes illegally assessed.

Denies that he ever stated to the said Goddard that the said taxes were illegally assessed in any manner or form whatsoever.

Denies that at Miles City on the 17th day of July, 1895, or at any other time, he ever told said Goddard that he should drive any cattle from the said reservation and sell them, but admits that it was his purpose, if not lawfully prevented, to seize and sell cattle as hereinbefore alleged.

X.

Denies that he will unlawfully go upon said reservation for any purpose, but is informed and believes that the purpose for
30 which he seeks to go upon the said reservation to collect the said taxes is lawful and proper.

XI.

Denies that to round up the cattle on the Crow Indian reservation at this season of the year, or at any season of the year, would be productive of either great injury or irreparable damages to the several herds, or any of the herds of cattle on the said reservation; or that to round up the cattle at any season of the year would cause great or irreparable damages to the owners of the cattle, or to the complainant or any one having cattle upon the said reservation; or that there would not be any adequate remedy at law to the said complainant and others whose taxes he might proceed to collect.

The defendant admits that in the years 1890 and 1894, the complainant had more than five thousand (5,000) cattle grazing on the said Crow Indian reservation, and that the said cattle were worth twenty dollars ($20.00) per head, and that the said complainant now has more than five thousand cattle grazing upon the said Crow Indian reservation, worth twenty dollars and more, per head; but whether or not, the said complainant has had any cattle upon the said reservation, except such as were permitted to be and to graze upon the said reservation, pursuant to terms of leases authorized by the United States, this defendant has not sufficient knowledge for information or belief; admits that the cattle of complainant and others, now grazing upon the said reservation, number more than thirty thousand (30,000) head, and that said cattle are worth more than the sum of twenty dollars per head,
31 but denies that the said persons have any common interest in resisting this defendant in seizing the said cattle for the collection of taxes; admits that the cattle of complainant and others, grazing upon the said reservation, to the number of more than one-fifth, are now ready for market, and that the same will be marketable as beef cattle during the present year; and alleges the fact to be in relation to said cattle, as this defendant understands it, that nearly all of the said cattle are steers, and especially denies that the rounding up of said cattle would cause a deterioration of the value of said cattle of two dollars per head, or of about that amount;

denies, as this defendant has elsewhere denied in this answer, that he has ever thought, or had a purpose of driving said cattle from said Crow Indian reservation, and denies that the disturbance of said cattle on said reservation, or any of them, would be an injury to the extent of two dollars per head by rounding up, and in relation to said rounding up, that his only purpose has been, and is, to gather sufficient cattle from the several owners against whom said assessments have been made, and to make the taxes assessed against each of the said several owners, which would require only a small portion of the cattle of each of the said owners to be rounded up; denies that by anything that this defendant proposes to do in relation to the said cattle that the damage to the complainant would be very great, or that the same could not be precisely or approximately settled in any action at law; denies that the statutes of Montana would not afford a remedy to complainant, or others similarly situated, for the rounding up, driving, disturbing and selling
32 of said cattle if this defendant is permitted to round up the said cattle and make said taxes therefrom; denies that on account of rounding up, seizing, selling or disturbing the said cattle the cost, expense or damage to said complainant or any others in grazing, superintending, properly placing or quieting the said cattle not sold by defendant, would be two dollars per head, or any other sum whatsoever, or that the said complainant, or any other similarly situated, would have no remedy at law; denies that the cattle assessed by the said county of Custer, and now grazing on the said Crow Indian reservation, are grazing upon lands owned by the said Indians or held by said Crow Indians as a tribe, but alleges that the fee of said lands is in the United States and the Crow Indians are not the owners thereof; but whether the said Crow Indians as a tribe have consented, or do now consent, to such grazing or to any leases or contracts by the United States authority with complainant and others, this defendant has not sufficient knowledge and information to form a belief.

For further answer in this behalf, defendant alleges, that he is the duly elected, acting and qualified treasurer of the county of Custer, and as such *ex officio* collector of taxes of said county.

That the said county is now, and for many years past has been, both while Montana existed as a Territory and now, one of the legally organized, corporate counties of said Territory and State of Montana.

That the Crow Indian reservation named in complainant's complaint is now, and was at all the times in plaintiff's complaint mentioned, and at all times when the authorities of said county
33 have levied taxes upon persons and property situate on the said reservation and sought to collect the same, within the boundaries of the said county of Custer, as established by law, and a part of said county, and within the jurisdiction so far as white persons and their property are concerned, of the State of Montana and of the county of Custer.

That the property assessed by the authorities of Custer county on

the said reservation was at all times when assessed the property of white persons.

That the cattle of complainant and of all the persons and corporations whose taxes this defendant now seeks to collect, were at all the times when assessed by the county of Custer upon the said reservation and within the boundaries of the said county of Custer as established by law, and subject to taxation therein.

That the several assessors of the said county since the year 1889, have in the several years in which taxes have been assessed upon the property situate on the said reservation, demanded payment of the owners of such property of their taxes as required by law.

The said persons, the complainant included, have always refused to render property lists of their property subject to taxation on the said reservation when the same were demanded, or to pay taxes thereon when taxes have been so assessed, when payment was demanded.

That in all the years when assessments have been made, since the year 1889, of property on said reservation, the several treasurers of said county have demanded payment of taxes of the owners of said property on said reservation, always to be refused.

34 That in addition to such demand, efforts to distrain property for such taxes have been made, as hereinbefore more particularly set forth.

That the greater portion of the persons owning cattle grazing upon said reservation assessed in the several years hereinbefore named, are residents of the county of Custer and State of Montana, just what number of them, this defendant is now unable to state, and has not the means of obtaining such information.

That all the persons so assessed upon the said reservation, whether residents of the county of Custer and State of Montana, or non-residents, have always been assessed by the authorities of said county at the same rate and the same values for cattle as all other inhabitants of the said county of Custer.

That while a few persons and corporations grazing cattle upon the said reservation have paid their taxes to the said county the same as all other tax-payers, yet the great majority of the persons so owning property upon the said reservation have always refused either to give property lists of their property upon the said reservation subject to taxation, or to pay taxes upon the same after the same had been assessed.

That this defendant has now the warrant for the collection of taxes of complainant, issued to him as required by law for collection of taxes upon property situate upon the said reservation, the same as all other delinquent tax-payers of said county.

Wherefore this defendant prays judgment, that he be not in any way restrained by any order of this court from the collection of said taxes, and for his proper costs and charges in the premises,

35 and for such other and further relief as to the court may seem meet and proper.

C. H. LOUD,
County Attorney of Custer County, Montana.
J. W. STREVELL,
T. J. PORTER,
Attorneys for Defendant.

J. W. STREVELL,
Post-office address, Miles City, Montana.
C. H. LOUD,
Post-office address, Miles City, Montana.
T. J. PORTER,
Post-office address, Miles City, Montana.

Filed July 30th, 1895.

GEO. W. SPROULE, *Clerk.*

And thereafter, to wit, on the 30th day of July, 1895, said cause came on regularly for hearing before the court, whereupon the following proceedings were had and entered of record as follows, to wit:

U. S. Circuit Court, District of Montana, April Term, A. D. 1895.

TUESDAY, *the 30th Day of July*, 1895.

Court convened pursuant to adjournment.
Present: Honorable Hiram Knowles, United States district judge for the district of Montana.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,
vs.
JOHN S. TRUSCOTT, Treasurer of Custer County, Montana, Defendant.

36 *Order Granting Temporary Injunction.*

Whereas, in the above-entitled cause an application for the issuance of a preliminary writ of injunction was duly filed and set down for hearing before the court on the 29th day of July, 1895, or as soon thereafter as counsel could be heard, notice of such application being given to John S. Truscott, treasurer of Custer county, Montana, the defendant herein, and the parties now appearing by their solicitors and being heard upon such application, and it appearing that cause exists for the granting of a writ of injunction pending the final hearing of the cause as prayed for,

It is therefore ordered, that upon complainant giving security by bond in the sum of ten thousand dollars, conditioned that the complainant shall pay to said defendant such damages, not exceeding the sum of ten thousand dollars, as he may sustain by reason of

the injunction if the court shall finally decide that the complainant is not entitled thereto, a writ of injunction issue commanding, restraining and enjoining the defendant, whether as county treasurer of Custer county, Montana, or individually, his attorneys, agents, servants, employees, deputies and assistants from going upon the Crow Indian reservation for the purpose of rounding up, seizing or driving away any of the cattle of complainant, and also from seizing, selling or driving away from said reservation any of said cattle, or from interfering with said cattle in any manner whatever, or from holding, keeping, selling or in any manner disposing of, or interfering with said cattle or any of them, if any of said cattle shall have been driven or removed from said reservation by de-
37 fendant or his attorneys, agents, servants, employees, deputies or assistants, except to return the said cattle so removed and any and all of them to said reservation, until the further order of the court in the premises.

Entered July 30, 1895.

GEO. W. SPROULE, *Clerk.*

And at said time the said defendant herein presented to the court, and the same was duly filed and signed and allowed his bill of exceptions herein, which said bill of exceptions is in the words and figures as follows, to wit:

Circuit Court of the United States in and for the District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainants,
vs.
JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.
} In Equity.

Bill of Exceptions.

Be it remembered that on this, the thirtieth day of July, A. D. 1895, the above-entitled cause came on to be heard in the said court before the Honorable Hiram Knowles, judge of said court, on the application of the complainants for an injunction restraining the said defendant, his agents and attorneys from collecting taxes upon property alleged to be due from persons heretofore taxed in
38 the county of Custer, which said property is alleged to be situate upon the Crow Indian reservation and alleged to be within the said county of Custer.

Messrs. B. P. and Stephen Carpenter and O. F. Goddard, Esqs., appearing as solicitors for the complainant, and C. H. Loud and J. W. Strevell and T. J. Porter, Esqs., appearing as solicitors for the defendant, and argument being had upon the application of the complainants for said injunction, the court did order, adjudge, and decree that an interlocutory order and decree, granting an in-

junction restraining the said defendant, his agents and attorneys from collecting taxes, pending the suit, from the said complainants in the complaint prayed for, be made and entered in the said cause, which said order was then and there so made and entered in the said court.

To the making and entering of the said order and decree the defendant, by his said solicitors, then and there, at the time of the making and entering of said order, duly excepted, on the ground and for the reason that the granting of said order is contrary to law, and now here asks that this, his bill of exceptions, be allowed and signed, which is accordingly done this thirtieth day of July, A. D. 1895.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Bill of exceptions. Filed July 30th, 1895.

And thereafter, to wit, on the 30th day of July, 1895, in accordance with said order, a bond on writ of injunction was duly
39 approved and filed in the sum of ten thousand dollars, and thereupon a writ of injunction was duly issued, which said writ of injunction is in the words and figures as follows, to wit:

United States Circuit Court in and for the District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,

vs.

JOHN S. TRUSCOTT, Treasurer of Custer County, Montana, Defendant.

Writ of Injunction.

The President of the United States of America to John S. Truscott, county treasurer of Custer county, Montana, Greeting:

Whereas, in the above-entitled cause now pending in said United States circuit court in and for the district of Montana, upon application duly made to the court, it was, on the thirtieth day of July, 1895, ordered that a preliminary writ of injunction issue therein, as prayed for in the bill of complaint herein filed and as directed in said order, upon the complainant giving security by bond in the sum of ten thousand dollars, conditioned that the complainant shall pay to said defendant such damages, not exceeding the sum of ten thousand dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the complainant is not en-
40 titled thereto, and said bond having been duly entered into and filed in this court and approved by Hon. Hiram Knowles, judge thereof.

Now, therefore, know ye that you, John S. Truscott, as county

treasurer of Custer county, Montana, and individually and your agents, attorneys, servants, employees, deputies and assistants, and each of you, are hereby strictly restrained and enjoined from going upon the Crow Indian reservation for the purpose of rounding up, seizing or driving away any of the cattle of complainant, The Hurlbut Land and Cattle Company, and also from seizing, selling or driving away from said reservation any of said cattle, or from interfering with said cattle in any manner whatever, or from holding, keeping, selling, or in any manner disposing of or interfering with said cattle or any of them, if any of said cattle shall have been driven or removed from said reservation by you, said John S. Truscott, or your attorneys, agents, servants, employees, deputies or assistants, except to return the said cattle so removed, and any and all of them, to said reservation, until the further order of the court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this thirtieth day of July, in the year of our Lord one thousand eight hundred and ninety-five, and the seal of said circuit court in and for the district of Montana.

[SEAL.] GEO. W. SPROULE, *Clerk.*

41 Endorsed: Service of the foregoing writ and order and receipt of copy thereof is hereby admitted by me this 1st day of August, 1895. John S. Truscott, county treasurer of Custer county, Montana, defendant. Also title of court and cause. Writ of injunction. Filed Aug. 2nd, 1895. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 7th day of August, 1895, the assignment of errors herein was duly filed by the defendant, which said assignment of errors is in the words and figures as follows, to wit:

Circuit Court of the United States, District of Montana, Ninth Circuit.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Organized and Existing under the Laws of the State of Illinois, Complainant,

vs.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Defendant.

Assignment of Errors.

Now comes the above-named defendant, John S. Truscott, county treasurer of Custer county, Montana, by his attorneys and solicitors, and says that in the records and proceedings in said cause in said circuit court for the district of Montana, in the judgment and decree entered therein, there is manifest error to the prejudice and injury of this defendant as follows:

42 I.

The court held that the Crow Indian reservation upon which the cattle sought to be destrained for taxes was situate, is within the exclusive jurisdiction of the United States, and that the defendant, as treasurer and collector of taxes of the said county of Custer, in the State of Montana, could not as such treasurer and collector of taxes, lawfully enter upon the said reservation for the purpose of collecting from white persons, non-residents of the State of Montana, taxes assessed by the said county of Custer against the property of such white persons non-residents of the State of Montana, which said decision and holding by the said court is contrary to law and against equity.

II.

The said circuit court held that neither the State of Montana nor the said county of Custer had any jurisdiction at all over the said Crow reservation; that neither the said State of Montana nor the said county of Custer, acting under and by virtue of the laws of the said State of Montana, had any authority to assess the property of white persons situate upon said Crow Indian reservation, nor to enter upon the said Crow Indian reservation by its lawfully constituted officers for the purpose of collecting taxes from such white persons non-residents of the State of Montana, in any manner whatsoever; that the said Crow Indian reservation was for all purposes wholly without the jurisdiction of the State of Montana, and out of the jurisdiction of the said county of Custer, which said decision and holding of the said court was contrary to law.

43 III.

The said circuit court held that the bill of complaint of the said complainant in this said cause filed, stated sufficient ground to entitle the court to grant the said complainant equitable relief in this cause, which said holding by the said court in that behalf was contrary to law.

IV.

That said circuit court erred in granting such interlocutory order for an injunction against this defendant.

Wherefore, the said John S. Truscott, treasurer of the county of Custer, in the State of Montana, and the defendant in this said cause, prays judgment that the said holding and decree of the said United States circuit court for the district of Montana, in the above cause entered on the thirtieth day of July, A. D., 1895, restraining the said defendant from the collection of taxes due from white persons on the said Crow Indian reservation be reversed.

C. H. LOUD,
J. W. STREVELL,
T. J. PORTER,
Of Miles City, County of Custer and State of Montana,
Attorneys for Defendant and Appellant.

(Endorsed:) Title of court and cause. Assignment of errors. Filed Aug. 7, 1895. Geo. W. Sproule, clerk.

And on said 7th day of August, 1895, the said defendant filed his petition for an allowance of appeal herein, and thereupon
44 the following proceedings were had and entered of record herein in the words and figures as follows, to wit:

U. S. Circuit Court, District of Montana, April Term, A. D. 1895.

Court convened pursuant to adjournment.
Present: Hon. Hiram Knowles, United States district judge.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation,
vs.
JOHN S. TRUSCOTT, Treasurer of Custer County, Montana. } No. 389.

Order Allowing Appeal.

This cause came on regularly this day on the petition of defendant herein for allowance of appeal from order granting injunction herein, and after due consideration it is ordered that an appeal be, and the same hereby is allowed.

Ordered that bond on appeal be, and the same hereby is fixed in the sum of three hundred dollars and citation issued. And on said 7th day of August, 1895, a citation was duly issued herein which said citation with the acceptance of service thereof is hereto annexed.

And thereafter, to wit, on the 10th day of August, 1895, the bond on appeal was duly approved and filed, which said bond is in the words and figures as follows, to wit:

45 In the United States Circuit Court, Ninth Circuit, District of Montana.

THE HURLBUT LAND AND CATTLE COMPANY, a Corporation Duly Organized and Existing under the Laws of the State of Illinois, Complainant,
vs.
JOHN S. TRUSCOTT, Treasurer of Custer County, Montana, Defendant.

Bond on Appeal.

Know all men by these presents, that we, John S. Truscott, county treasurer of Custer county, State of Montana, as principal, and Walter B. Jordan and Thomas E. Hammond as sureties, are held and firmly bound unto The Hurlbut Land and Cattle Co., a corporation, the above-named complainant, in the sum of three hundred dollars ($300) to be paid to the said complainant, for the payment of which well and truly to be made we bind ourselves, and

each of us jointly and severally and our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of August, A. D. 1895.

Whereas, the above-named John S. Truscott, treasurer of Custer county, State of Montana has prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse an interlocutory order granting a preliminary injunction rendered in the above-entitled suit by the Hon. Hiram Knowles, United States district judge.

Now, therefore, the condition of the above obligation is
46 such that if the said John S. Truscott, treasurer of the county of Custer, State of Montana, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void, else to remain in full force and effect.

Signed with our hands and sealed with our seals this 8th day of August, A. D. 1895.

[SEAL.] JOHN S. TRUSCOTT,
County Treasurer of Custer County, Montana.
WALTER B. JORDAN. [SEAL.]
THOMAS E. HAMMOND. [SEAL.]

UNITED STATES OF AMERICA, } ss:
District of Montana, County of Custer, }

Walter B. Jordan and Thomas E. Hammond, the above-named sureties being first duly sworn, on oath, each for himself says, that he is a freeholder and resident in the State of Montana, in the district of Montana, and that he is worth the sum of three hundred dollars over and above all his just debts and liabilities.

WALTER B. JORDAN.
THOMAS E. HAMMOND.

Subscribed and sworn to before me this 8th day of August, 1895.
[SEAL.] A. H. SWERDFIGA,
County Clerk.

I hereby approve of the above bond this the 10th day of August, 1895.

HIRAM KNOWLES, *Judge.*

Title of court and cause. Bond on appeal. Filed August 10th, 1895. Geo. W. Sproule, clerk.

47 *Citation.*

UNITED STATES OF AMERICA, ss:

To The Hurlbut Land and Cattle Company, a corporation, and Messrs. Goddard, Carpenter & Carpenter, attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the ninth circuit, to be held

at the city of San Francisco, in the State of California, on the 27th day August, A. D. 1895, pursuant to an appeal, wherein John S. Truscott, treasurer of the county of Custer, State of Montana, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the interlocutory order granting an injunction in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, United States district judge for the district of Montana, this 7th day of August, A. D. 1895, and of the Independence of the United States, the one hundred and twentieth.

HIRAM KNOWLES,
United States District Judge.

Service of the within citation is hereby acknowledged this 9th day of August, 1895.

O. F. GODDARD,
Solicitor and of Counsel for Complainant.

(Endorsed:) No. 389. In the U. S. circuit court of appeals, ninth circuit. The Hurlbut Land and Cattle Co., appellee, *vs.* John S. Truscott, treasurer, appellant. Citation. Filed August 10, 1895. Geo. W. Sproule, clerk.

48 *Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss:
District of Montana, }

Circuit Court of the United States, Ninth Circuit, District of Montana.

I, George W. Sproule, clerk of the circuit court of the United States for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 44 pages, numbered consecutively from 1 to 44 inclusive, is a true and correct and complete transcript of the records, process, pleadings, order and interlocutory order or decree granting an injunction in said cause and of the whole thereof as appear from the original records and files of said court, and I do further certify and return that I have annexed to said transcript, and included within said paging the original citation and return of service thereof. I further certify that the costs of the transcript of record amounts to the sum of $35.85, and that the same has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said circuit court at Helena, in the said district of [SEAL.] Montana, this 19th day of August, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and twentieth.

GEO. W. SPROULE, *Clerk.*

49 (Endorsed:) No. 250. U. S. circuit court of appeals for the ninth circuit. John S. Truscott, county treasurer of Custer county, Montana, appellant, *vs.* The Hurlbut Land and Cattle Co. (a corporation), appellee. Transcript of record. Appeal from the circuit court of the United States, district of Montana. Filed August 27th, 1895. F. D. Monckton, clerk.

50 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND AND CATTLE COMPANY, a Corporation, Appellee.

Appeal from the circuit court of the United States for the district of Montana.

Before Gilbert and Ross, circuit judges, and Morrow, district judge.

Ross, circuit judge, delivered the opinion of the court:

The Crow Indian reservation is within the geographical limits of the county of Custer, in the now State of Montana, and the sole question here presented for decision relates to the power of the proper authorities of that county to levy and collect taxes, pursuant to the State laws, upon cattle belonging to an Illinois corporation, and being within the lines of the reservation, grazing upon its lands, under lease from the Indians, ratified and confirmed by act of Congress, and for which the Indians are paid, under the direction of the Secretary of the Interior.

51 Montana was organized as a Territory by an act of Congress approved May 26, 1864 (13 Stats. at Large, p. 85), by the first section of which it is provided "That nothing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which by treaty with any Indian tribes is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory, but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Montana until such tribe shall certify their assent to the President of the United States to be included within the said Territory, or to affect the authority of the Government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been for the Government to make if this act had never been passed."

At the time of the passage of this act of Congress organizing the Territory of Montana, there existed no treaty between the United

States and any Indian tribe prohibiting any part of the present Crow reservation from being included within the territorial limits or jurisdiction of any State or Territory without the consent of such tribe. It is clear, therefore, that the reservation in question was embraced within the limits of the Territory of Montana. (Langford *vs.* Monteith, 102 U. S., 145, 147; Utah & Northern Railway Co. *vs.* Fisher, 116 U. S., 28.)

A treaty between the United States and the Crow Indians was, however, entered into May 7, 1868 (15 Stats. at Large, p. 650),
52 by which the United States set apart for the undisturbed use and occupation of those Indians and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them, that portion of the Territory of Montana "commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory, thence along said 107th meridian to the mid-channel of the Yellowstone river; thence up said mid-channel of the Yellowstone river to a point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude, and thence east along said parallel to the place of beginning." The treaty contained the further agreement on the part of the United States that no persons, except those therein designated and authorized so to do and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the reservation so set apart for the use of the Crow Indians, and also a relinquishment on the part of those Indians of all title, claims, or rights in and to any portion of the territory of the United States except such as is embraced within the limits of the said reservation.

Subsequently, to wit, on the 12th day of June, 1880, a certain agreement was executed by a majority of all the adult male members of the Crow tribe, in conformity with the provisions of article 11 of the treaty of May 7, 1868, agreeing to dispose of and sell to the Government of the United States for certain considera-
53 tions a certain part of the Crow reservation, which agreement was ratified by act of Congress approved April 11, 1882 (22 U. S. Stats. at Large, p. 42), and which agreement, so ratified, contained the provision, "That is, if at any time hereafter we (the Crow Indians), as a tribe, shall consent to permit cattle to be driven across our reservation or graze thereon, the Secretary of the Interior shall fix the amount to be paid by parties so desiring to drive or graze cattle; all moneys arising from this source to be paid to us under such rules and regulations as the Secretary of the Interior may prescribe."

Certainly until the Territory of Montana became a State the jurisdiction of the United States over the soil embraced within the limits of the reservation and over the people who should inhabit it, subject to the provisions of the treaty and of the subsequent agreements with the Crow Indians, was absolute and exclusive. Prior to the 3rd day of March, 1871, the United States always ex-

ercised its power and jurisdiction over the Indian tribes by means of treaties, but on that day a radical change was made in the pre-existing policy by the enactment of a law which, while continuing unimpaired every obligation of any treaty theretofore lawfully made and ratified with any Indian nation or tribe, declared that thereafter "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (Revised Statutes, sec. 2079.)

The Territory of Montana became a State under and in pursuance of the act of Congress approved February 22, 1889 (25 U. S. Stats. at Large, p. 676), entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an
54 equal footing with the original States, and to make donations of public lands to such States." By that act the qualified electors of the then Territory of Montana, at an election to be held for the purpose, were authorized to meet in convention to form a constitution and State government for the proposed State of Montana, which constitution should be republican in form and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and which should not be repugnant to the Constitution of the United States or the principles of the Declaration of Independence, and which convention should provide by ordinance, among other things, that the people inhabiting the proposed State of Montana "agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, * * * but nothing herein or in the ordinances herein provided for shall preclude the said State from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said ordinances shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such act of Congresss may prescribe."
55 The act providing for the formation and admission into the Union of the State of Montana contained no other exception of the Crow reservation or jurisdiction over it than is found in the foregoing quotation, which provisions were embodied in sec. 2 of ordinance No. 1, adopted by the constitutional convention of 1889, in these words:

"Second. That the people inhabiting the said proposed State of

Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereon, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing within the said State of Montana shall never be taxed at a higher rate than the land belonging to the residents thereof; that no taxes shall be imposed by the said State of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved to its use. But nothing herein contained shall preclude the said State of Montana from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States, or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last-
56 named lands shall be exempt from taxation by said State of Montana so long and to such extent as such act of Congress may prescribe."

All of the provisions of the enabling act having been duly complied with on the part of the proposed State of Montana, the State was duly admitted into the Union on an equal footing with the original States, and afterwards the State enacted this statute: "The sovereignty and jurisdiction of this State extends to all places within its boundaries as established by the constitution, excepting such places as are under the exclusive jurisdiction of the United States, but the extent of such jurisdiction over places that have been or may be ceded to, purchased, or condemned by the United States is qualified by the terms of such cession or the laws under which purchase or condemnation has been or may be made" (Political Code of Montana, sec. 40). By section 41 of the same code the legislature of the State declared that all legal processes of the State, whether civil or criminal, may be served upon persons and property found within any of the military reservations or on any Indian reservation in all cases where the United States has not exclusive jurisdiction.

Undoubtedly, in so far as concerns the government and protection of the Crow Indians and for all purposes relating to the treaty and agreements between that tribe and the United States, the reservation in question is within the sole and exclusive jurisdiction of the United States. But is it to be regarded as without the jurisdiction of the State of Montana for all purposes? Clearly not. The people inhabiting the proposed State were required by Congress to agree, and did agree, as one of the conditions to its admis-
57 sion into the Union to disclaim any right or title to all lands lying within the limits of the proposed State owned

or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall — and remain subject to the disposition of the United States and under the absolute jurisdiction and control of Congress. The people inhabiting the proposed State were required to make and did make as one of the conditions of its admission into the Union a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of Congress for all purposes relating to their control or disposition. The State could not tax or incumber such unappropriated public lands or otherwise interfere with the jurisdiction and control over them reserved by the United States, but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the State and county in which it should be found. We are unable to see any good reason why the authority of the State and its subordinate subdivisions, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, provided, as in this case, the Indians are in no way interested in it. The cattle upon which the taxes in question were levied were grazing upon the reservation under lease from the Crow Indians, the sanction of which by the United States did no violence to the provisions of the treaty between the Government and them. They were within the geographical limits of the State of Montana and of the county of Custer, of that State, and were the property, not of the Indians, but of a corporation of the
58 State of Illinois, and were confessedly liable to the taxes levied unless they were without the jurisdiction of the State of Montana. That they were not we consider very clear. What was said by the Supreme Court in the case entitled Utah & Northern Railway Co. *vs.* Fisher, 116 U. S., 28–31, in respect to the authority of the then Territory of Idaho to tax that portion of a railroad extending, with the consent of the Indians, through a similar reservation, is applicable to the State of Montana. The authority of the Territory, said the court, may rightfully extend to all matters not interfering with the protection of the Indians. "It has therefore been held that process of its courts may run into an Indian reservation of this kind where the subject-matter is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by act of Congress of July 3, 1882." (116 U. S., 31, '2.)

The cattle here sought to be taxed, as has been said, were upon the reservation under lease from the Indians, sanctioned by act of Congress, and it is impossible to perceive that any of their just rights under the treaty and agreements with them on the part of the United States can be impaired by subjecting complainant's

cattle to taxation. In reserving lands for the exclusive and undisturbed use of these Indians and for others who, with their consent and with that of the United States, should occupy them, it
59 was not the intention of Congress to establish an asylum into which persons other than the Indians, whether natural or artificial, can take their property and hold it exempt from its just portion of the taxation necessary for the support of the government which gives it protection. For the protection of the complainant's cattle in all matters unconnected with the Indians the authority of the State of Montana is available. In Langford *vs.* Monteith, *supra*, it was held that where by treaty the reservation was not excluded from the limits of the Territory civil process in a suit between white men in a court of the Territory may run into the reservation, notwithstanding the Indians themselves are exempt from that jurisdiction. And that the criminal jurisdiction of the State courts extends to crimes, in which the Indians have no part, committed upon a similar reservation was held by the Supreme Court in United States *vs.* McBratney, 104 U. S., 621, and in United States *vs.* Kagama, 118 U. S., 375, 383. See also United States *vs.* Thomas, 151 U. S., 577; Torrey *vs.* Baldwin, 26 Pac. Rep., 908. The doctrine of these cases sustains, we think, the authority of the State of Montana to tax the cattle in question and other personal property similarly situated.

As this is the only question presented for decision, the order enjoining the State authorities from proceeding with the collection of the taxes in question is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed Feb. 3, 1896. F. D. Monckton, clerk.

60 United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND & CATTLE COMPANY (a Corporation), Appellee.
} No. 250.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree and order of the said circuit court in this cause be, and the same is hereby, reversed, with costs to the appellant, and the cause is remanded for further proceedings not inconsistent with the opinion of this court.

(Endorsed:) Decree. Filed Feb. 3, 1896. F. D. Monckton, clerk.

61 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND AND CATTLE COMPANY (a Corporation), Appellee.

The above-named appellee, The Hurlbut Land and Cattle Company, conceiving itself aggrieved by the order entered in said court on the third day of February, 1896, reversing the interlocutory injunction order of the United States circuit court for the district of Montana, entered in said cause on the 30th day of July, 1895, doth hereby appeal from said order to the Supreme Court of the United States, and prays that this its said appeal may be allowed, and that the transcript of record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

O. F. GODDARD,
STEPHEN CARPENTER,
B. P. CARPENTER,
Solicitors for Appellee & of Counsel.

(Endorsed:) Petition for appeal. Filed Mar. 16, 1896. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

62 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND AND CATTLE COMPANY (a Corporation), Appellee.
Assignment of Errors.

Now comes the appellee, The Hurlbut Land and Cattle Company, by its solicitors, and says that in the record and proceedings in the above-entitled cause in said United States circuit court of appeals for the ninth circuit there is manifest error as follows, to wit:

I.

The said court held that the United States has not exclusive jurisdiction over the Crow Indian reservation.

II.

The said court held that the State of Montana has jurisdiction to tax any property on the Crow Indian reservation owned and held by others than Indians.

III.

The said court held that the State of Montana had and has the right to tax the cattle of the appellee, which is a corporation duly

organized and existing under the laws of the State of Illinois
63 and having its principal place of business therein, which cattle were and are grazing on said Crow Indian reservation, upon lands held by the Crow Indians as a tribe, and under leases duly executed with the consent of said Crow Indian tribe, the money consideration for such grazing privileges being paid to the said Crow Indians.

IV.

The said court held that the said appellant, John S. Truscott, as treasurer, had and has the right to enter upon said Crow Indian reservation and seize the cattle of said Hurlbut Land and Cattle Company there grazing, and sell the same for the purpose of collecting taxes assessed by the authorities of said county of Custer, Montana, upon appellee on account of such cattle grazing on said Crow Indian reservation, under leases duly executed, with the consent of said Crow Indian tribe.

V.

The said court held that the act of Congress (25 United States Statutes at Large, p. 876) entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889, does not retain or reserve in the United States any jurisdiction over said Crow Indian reservation, except so far as Indians and their property
64 thereon are concerned.

VI.

The said court held that the State of Montana has the same right, authority, and jurisdiction to assess and collect taxes and execute legal process upon said Crow Indian reservation, providing the Indians and their property are not disturbed or affected thereby, that it has to assess and collect taxes and execute legal process in any other part of the State.

VII.

The said court reversed the order of the United States circuit court for the district of Montana enjoining the said appellant from proceeding with the collection of the taxes assessed against the said Hurlbut Land and Cattle Company until the final determination of said cause.

VIII.

The appellee says that all of the aforesaid holdings, rulings, and decisions by said court are erroneous and contrary to law.

Wherefore the said Hurlbut Land and Cattle Company prays that the order and decree of said United States circuit court of appeals for the ninth circuit in the above cause, heretofore entered, to wit, February 3rd, 1896, reversing the order of the United States circuit

court for the district of Montana granting a preliminary in-
65 junction, entered July 30th, 1895, be reversed, and that the said order of the United States circuit court for the district of Montana be affirmed.

O. F. GODDARD,
STEPHEN CARPENTER,
B. P. CARPENTER,
Solicitors for Appellee.

(Endorsed:) Assignment of errors. Filed Mar. 16, 1896. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

66 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND AND CATTLE COMPANY (a Corporation), Appellee.

Bond for Costs of Appeal.

Know all men by these presents that we, The Hurlbut Land and Cattle Company, as principal, and Alexander C. Johnson and James Sullivan, both of the city of Helena, county of Lewis and Clarke and State of Montana, as sureties, are held and firmly bound unto the above-named John S. Truscott, county treasurer of Custer county, Montana, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said John S. Truscott, county treasurer of Custer county, Montana, and his certain attorney, executors, administrators, successors, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this fifth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

67 Whereas the above-named The Hurlbut Land and Cattle Company has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree rendered in the above-entitled suit by the judges of the circuit court of appeals of the ninth circuit on the 3rd day of February, 1896:

Now, therefore, the condition of this obligation is such that if the above-named The Hurlbut Land and Cattle Company shall prosecute said appeal to effect and answer all damages if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE HURLBUT LAND AND CATTLE COMPANY, [L. S.]
By ALEXANDER C. JOHNSON,
Attorney-in-fact.
ALEXANDER C. JOHNSON. [L. S.]
JAMES SULLIVAN. [L. S.]

UNITED STATES OF AMERICA, }
District of Montana, } *ss:*

Alexander C. Johnson and James Sullivan, being first duly sworn each for himself, says and deposes that he is a resident and householder in said district, and that he is worth the sum of one thousand dollars exclusive of property exempt from execution and over and above all debts and liabilities.

ALEXANDER C. JOHNSON.
JAMES SULLIVAN.

Subscribed and sworn to before me this 5th day of March, 1896.

GEORGE W. SPROULE,
Commissioner of United States Circuit Court,
District of Montana.

68 I certify that said Alexander C. Johnson has full authority to sign the name of the said The Hurlbut Land and Cattle Company as principal in the execution of the foregoing bond, and that the said Alexander C. Johnson and James Sullivan, the sureties above named, are men of large means and are worth the penal sum mentioned in the said bond.

Dated March 5th, 1896.

GEORGE W. SPROULE,
Commissioner United States Circuit Court, District of Montana.

Approved:
JOSEPH McKENNA,
Circuit Judge, 9th Circuit.

(Endorsed:) Bond on appeal. Filed Mar. 16, 1896. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

69 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the sixteenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William W. Morrow, district judge.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND & CATTLE COMPANY. } No. 250.

On application of Messrs. Carpenter & Carpenter, counsel for the Hurlbut Land & Cattle Company, it is ordered that an appeal to the Supreme Court of the United States from the decree of this court, filed and entered herein on the 3rd day of February, 1896, be, and the same is hereby, allowed, and that the bond on said appeal be, and the same is hereby, fixed at the sum of five hundred dollars.

70 United States Circuit Court of Appeals for the Ninth Circuit.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellant,
vs.
THE HURLBUT LAND & CATTLE COMPANY (a Corporation), Appellee.
} No. 250.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing sixty-nine pages, numbered from one to sixty-nine, both inclusive, to be a full, true, and correct copy of the printed transcript of record and of all proceedings in our said circuit court of appeals, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said cause.

Attest my hand and the seal of said United States circuit court of appeals, at San Francisco, this 26th day of March, A. D. 1896.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to John S. Truscott, county treasurer of Custer county, Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 14th day of May next, pursuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, in that certain cause wherein you, John S. Truscott, county treasurer of Custer county, Montana, are appellant and The Hurlbut Land and Cattle Company is appellee, to show cause, if any there be, why the order and decree granted and rendered against the said appellee, as in said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, United States circuit judge for the ninth circuit, this 16th day of March, 1896.

JOSEPH McKENNA,
U. S. Circuit Judge, Ninth Circuit.

Service of the foregoing citation accepted this 21 day of March, 1896.

JASON W. STREVELL,
Residence, Miles City, Mont.;
T. J. PORTER,
Residence, Miles City, Mont.;
CHAS. H. LOUD,
Residence, Miles City, Mont.,
Attorneys for John S. Truscott.

72 [Endorsed:] # 250, Dock. 1. Circuit court of appeals, ninth circuit. John S. Truscott, etc., appellant, *vs.* The Hurlbut Land and Cattle Company, appellee. Citation. Filed March 26th, 1896. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

Endorsed on cover: Case No. 16,288. U. S. circuit court of appeals, 9th circuit. Term No., 998. The Hurlbut Land & Cattle Company (a corporation), appellant, *vs.* John S. Truscott, county treasurer of Custer county, Montana. Filed May 5th, 1896.

165-719

Office Supreme Court, U. S.
FILED.
OCT 12 1896
JAMES H. McKENNEY,
CLERK.

165-719

IN THE

Supreme Court of the United States.

THE HURLBUT LAND AND CATTLE Company (a corporation), Appellant,

vs.

JOHN S. TRUSCOTT, TREASURER of Custer County, Montana, Appellee.

October Term, 1896.
No. 512

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Motion to Advance.

Now comes the appellant in the above entitled case, the Hurlbut Land and Cattle Company, by its counsel, and moves this court to advance the said case for hearing at an early day, and for grounds of said motion, respectfully assigns the following:

1. Appellant says that is now, and ever since the year 1890 has been, the owner of many thousand head of cattle; that said cattle are, and during said time have been, grazing upon certain lands belonging to the Crow

Nation of Indians, and known as the Crow Indian Reservation, which is located within the limits of the State of Montana, and is contiguous to the County of Custer in said State; that said cattle are and were so allowed to be and graze upon the lands contained in said reservation under certain leases from the said tribe of Indians to appellant, authorized and approved by the United States, and that the money therein contracted to be paid for the use of said land for the purpose aforesaid is, and has always been, paid for the benefit of said Indians and to them as a tribe.

2. Appellant further shows to the court that, in addition to its own cattle, so grazing upon said lands as aforesaid, there are, also grazing upon lands in said reservation, many thousands of cattle belonging to other parties or corporations who are permitted to use said land for such purpose under leases similar to those in force between the said Indians and the appellant herein; that these leases were also authorized and approved by the Government of the United States, and that the money contracted to be paid to the Indians for said privilege is, and has been, likewise paid for their benefit and to them as a tribe.

3. Appellant further says that the said Crow Indian Reservation, although within the exterior territorial boundaries of the State of Montana, is not within the jurisdiction of said State or that of the said County of Custer, and that, therefore, the said cattle of the appellant, so located and lodged within said reservation under the duly authorized leases aforesaid, were and are not subject to taxation by the authorities of said State or County, but appellant says that the said cattle were, in the absence of all jurisdiction or authority in the premises,

as aforesaid, illegally assessed and taxed, and are now threatened to be sold for the collection of said taxes, by the officials of said county charged with the duty of assessing and collecting the same. Facts are set forth in the Record showing the said threatened seizure and sale of said cattle by the said authorities, and showing that irreparable injury would result should such sale be permitted, and also showing inadequate remedy at law.

4. Appellant further says that the taxes so illegally assessed by the authorities of the said County of Custer upon the said cattle of this appellant amounted, in the year 1890, to the sum of $3,237.53, and in the year 1894, to $2,701.33; that the total amount of said alleged illegally assessed taxes now sought to be collected by the appellee, as the treasurer of said county, by means of the seizure and sale of all cattle so grazing upon said reservation upon which taxes have not been paid, including the said cattle of appellant, is about $110,000.

5. Appellant further says that upon the aforesaid illegal assessment and threatened collection of said taxes, this appellant filed in the Circuit Court of the United States for the District of Montana its bill of complaint against the said County Treasurer, praying for an injunction to restrain the said threatened collection of said illegally assessed taxes; that shortly thereafter an injunction was granted by the said court, as prayed; that, upon appeal by said defendant to the Circuit Court of Appeals of the United States for the Ninth Circuit, the decree of the court below was reversed and the injunction dissolved, and that this dissolution of the injunction left said matter in such a condition that the said appellee could then and may now at any time, unless restrained by the order of this honorable court, proceed to seize and

sell the said cattle for the purpose of realizing the amount of the taxes so illegally assessed. Appellant shows, however, that counsel for appellee have consented, in the event that the hearing of this case shall be advanced by this court, to await its decision and action in the premises, and have united in this motion. This consent and request of counsel for appellee that the case be advanced are hereto attached, made a part hereof, and marked Exhibit A.

6. This appellant, further, says that unless this case is speedily heard and decided by this court, the said appellee will proceed in the matter of the collection of said taxes, and will thereby cause great and irreparable injury to appellant, as above stated.

7. Appellant further says that if it be lawful for the said authorities so to assess and collect taxes upon the cattle grazing upon the lands of the said Indian Reservation, as aforesaid, the said Indians, as it is claimed, will be deprived of, and lose, at least in part, the revenue heretofore derived by them from the use of their said lands for the grazing thereupon of cattle, because, in that event, the cattle owners now using the same will cease to use said lands for that purpose, the consideration for the leasing thereof being largely their supposed exemption from State or county taxation.

8. And appellant further says that one of the questions involved in the present case, as above indicated, is whether or not the said Crow Indian Reservation is under the sole and exclusive jurisdiction of said Indians and the United States, and whether, therefore, the said cattle, so grazing thereupon under such duly authorized

and approved leases, are or are not subject to taxation by said authorities, and that this question is of the utmost importance to all the parties concerned therein, because of which it is desired, not only by the appellant and other cattle owners whose cattle are upon said reservation, but by the officials and authorities of said State as well, to obtain from this court an early decision as to the right of said authorities to levy and collect such taxes.

In view of the importance of this question it is respectfully submitted that this case should be set for hearing by the court at an early day.

JEREMIAH M. WILSON,
B. P. CARPENTER,
STEPHEN CARPENTER,
Counsel for Appellant.

WASHINGTON, D. C.,
September 28, *1896.*

[**Exhibit A.**]

IN THE

Supreme Court of the United States.

THE HURLBUT LAND AND CATTLE COMPANY (a corporation), Appellant, *vs.* JOHN S. TRUSCOTT, COUNTY Treasurer of Custer County, Montana, Appellee.	October Term, 1896. No. ——.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

Consent to Advancement of Cause on the Calendar

We, the undersigned, solicitors and of counsel for John S. Truscott, County Treasurer of Custer County, Montana, the appellee in the above entitled cause, recognizing the importance to the public of an early hearing, and submission to the Honorable Supreme Court, of the appeal in said cause, hereby consent and earnestly request that the hearing of the appeal in said cause be set for the earliest day convenient for the court. We further

consent and desire that this consent and request be attached to and made part of any motion by the appellant to advance said cause for an early hearing.

Dated Miles City, Montana, the 9th day of September, 1896.

C. H. LOUD,
J. W. STREVELL,
T. J. PORTER,
Solicitors and of Counsel for Appellees.

165-719

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK

165-719

IN THE

Supreme Court of the United States.

October Term, 1896.

THE HURLBUT LAND AND CATTLE CO.,
A CORPORATION,
Appellant,

vs.

JOHN S. TRUSCOTT, COUNTY TREASURER
OF CUSTER COUNTY, MONTANA,
Appellee.

No. 512.

Appeal from the Court of Appeals of the United States for the Ninth Circuit.

BRIEF FOR APPELLANT,

By JEREMIAH M. WILSON,
Attorney for Appellant.

STEPHEN CARPENTER and
B. F. CARPENTER,
Of Counsel.

McGILL & WALLACE, LAW PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE HURLBUT LAND AND CATTLE COMPANY (a corporation), Appellant,

vs.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellee.

No. 512.

Appeal from the Circuit Court of Appeals of the United States for the Ninth Circuit.

BRIEF FOR APPELLANT.

Statement.

1. The appellant in the above-entitled case, the Hurlbut Land and Cattle Company, a corporation organized under the laws of Illinois, on the 23d of July, 1895, filed its bill of complaint in the Circuit Court of the United States for the District of Montana against the appellee, as Treasurer of Custer County, praying for an injunction to restrain and prevent the collection of certain taxes, aggregating $5,938.86, assessed upon a large number of cattle belonging to appellant that had been, from the

year 1889, grazing upon lands situate within the Crow Indian Reservation under certain leases made by said Indians and approved by the proper authorities of the United States, according to law. (*R., p. 1, et seq.*)

2. The lands out of which the said Crow Indian Reservation was carved, prior to the establishment of said reservation, were, and had been from time immemorial, held by said Crow Indians in their aboriginal right, and, so far as the lands now embraced in said reservation are concerned, this aboriginal title of the Indians has not only never been extinguished but has been expressly confirmed by the United States, as will hereinafter more fully appear.

3. The said Crow Indian Reservation was created and defined under the terms of a certain treaty between said Indians and the United States, promulgated on the 12th of August, 1868 (*15 Stats., 650*), which reduced the area of the territory then occupied by said Indians to certain limits, and is within the geographical limits of the State of Montana and of the County of Custer.

4. On the 11th of April, 1882 (*22 Stats., 42*), a certain agreement made with said Indians was ratified by Congress, by which it was provided that if at any time thereafter the Crow Indians, as a tribe, should consent to permit cattle to be driven across or graze upon their reservation, the Secretary of the Interior should fix the amount to be paid for such privilege by the owners of such cattle, and that all moneys arising from this source should be paid to said Indians under such rules and regulations as the Secretary of the Interior might prescribe.

5. Pursuant to the above agreement, certain leases were executed by said Indians to a number of cattle owners, among whom was the appellant, and approved by the

Secretary of the Interior, under which the appellant was permitted to graze its cattle on the lands within said reservation, and for which privilege the said Indians derived a yearly income from the appellant of about $7,000.

6. Under the leases above mentioned, in the years 1890 and 1894, and prior and subsequent thereto, the appellant had upon lands embraced in said reservation, lawfully grazing thereon as aforesaid, pursuant to said lease, about 8,000 head of cattle, worth about $20 per head, which were, in said years 1890 and 1894, listed, assessed, and taxed by the authorities of Custer County, as were also cattle belonging to other owners located upon said reservation under similar leases. In the years 1891, 1892, and 1893 no assessments were made on account of said cattle, and the taxes that were so assessed in 1890 and 1894 were not paid.

7. On the 15th of July, 1895, the Treasurer of Custer County, the appellee herein, was directed to "round up, seize, and take from the reservation," and to sell, for the purpose of collecting said taxes, the cattle belonging to appellant and the other owners who were in default in the payment of the taxes so assessed against them; and upon being informed of this action of the county authorities appellant filed in the Circuit Court of the United States for the District of Montana its bill of complaint, praying for an injunction, as aforesaid. (*R., pp. 1–6.*)

8. On the 30th of July, 1895, the said Circuit Court of Montana issued an order restraining and enjoining the appellee from going upon said reservation for the purpose of rounding up, selling, or driving away the cattle of the appellant, and from interfering with the same in any way whatsoever (*R., pp. 20, 21*), whereupon an appeal

was allowed and taken to the Circuit Court of Appeals, which latter court dissolved the injunction and reversed the order of the court below. (*R., p. 33.*)

9. From this action of the Circuit Court of Appeals an appeal was taken to this court, and the only question presented by the record for consideration is whether or not the said Crow Indian Reservation is under the sole and exclusive jurisdiction of the United States for *all* purposes, or whether it is within the jurisdiction of said county and State for the purpose of assessing and collecting taxes upon the property of persons other than Indians located thereon—in the case at bar the cattle of the appellant; and, in this connection, whether the attempted taxation and seizure of this property is a violation of that provision of section 8 of article 1 of the Constitution of the United States, which provides that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Assignment of Errors.

1. The court below erred in holding that the United States have not exclusive jurisdiction over the Crow Indian Reservation.

2. Said court erred in holding that the State of Montana has jurisdiction to tax any property on said reservation owned and held by others than Indians.

3. The said court erred in holding that the State of Montana had, and has, the right to tax the cattle of the appellant, which is a corporation duly organized and existing under the laws of the State of Illinois, having its principal place of business therein, which cattle were and are grazing upon said reservation, upon lands held by the Crow Indians as a tribe, and under leases duly

executed with the consent of said Indians, the money consideration for such grazing privileges being paid to them.

4. The said court erred in holding that the appellee, as county treasurer, had and has the right to enter upon the said reservation and seize the cattle of the appellant there grazing, and sell the same for the purpose of collecting taxes assessed by the authorities of the County of Custer, in the State of Montana, under the conditions aforesaid.

5. The said court erred in holding that the act of Congress entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form Constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public land to such States," approved February 22, 1889 (*25 Stats., 876*), does not retain or reserve to the United States any jurisdiction over the said Crow Indian Reservation, except so far as Indians and their property thereon are concerned.

6. The said court erred in holding that the State of Montana has the same right, authority, and jurisdiction to assess and collect taxes and execute legal process upon said reservation, providing the Indians and their property are not disturbed thereby, that it has to assess and collect taxes and execute legal process in any other part of the State.

7. The said court erred in reversing the order of the United States Circuit Court for the District of Montana enjoining the appellee from proceeding with the collection of the taxes assessed against appellant.

8. And other errors appearing upon the record.

BRIEF.

I

The conditions existing with reference to the land embraced within the Crow Indian Reservation prior to, and at the time of, the admission of Montana into the Union.

Before entering upon a discussion of the legal effect of the provisions of the various treaties and statutes relating to the reservation in question in this case, and in order that the court may clearly understand the contentions of the appellant as hereinafter set forth, we desire, at the outset of this brief, to insert as concise and as condensed a history as we can of the conditions existing with reference to said reservation prior to, and at the time of, the admission of Montana into the Union as a State.

1. The Crow Indians are of the Siouan family, and were the recognized aboriginal occupants of a tract of country in the southern part of the present State of Montana, now forming a part of that State, in which was included the land embraced in their present reservation. As early as 1817 they were located by the explorers, Lewis and Clarke, on the Yellowstone River, between the 105th and 110th degrees of west longitude and north of the 46th degree of north latitude. In the year 1829 they were located by Porter at the same place. Drake located them in said region of country in 1834, and the Indian report of 1842 locates them on the headwaters of the Yellowstone, and ranging along that river. (*See notes on file in the Bureau of American Ethnology.*)

2. Montana was organized as a Territory under the act of May 26, 1864 (*13 Stats., 85*), the first section of which contains the following provision:

"Nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, *so long as such rights shall remain unextinguished by treaty,* * * * *or* to include any territory which, by treaty with any Indian tribes, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any State or Territory."

In section 6 of said act it is further provided that—

"The legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil."

What were the "rights of person and property" then pertaining to the Crow Indians that Montana could not impair? At the time of the passage of this act, under which the said Territory was organized, "they had an unquestioned right to the lands they occupied until that right should be extinguished by a voluntary cession to our Government (*Cherokee Nation* v. *Georgia*, 5 Pet., 1); "they owe no allegiance to the States, and receive from them no protection" (*United States* v. *Kagama*, 118 U. S., 375); and, while the fee of their lands was in the United States, they had a title by occupancy which secured to them the full benefit and enjoyment thereof.

3. These aboriginal rights of said Indians could not be impaired by Montana until they should be extinguished by treaty, and they never were so extinguished. On the contrary, in 1868, a treaty was made with them (*15 Stats., 650*), by which they relinquished to the United States all their lands *except* the lands now embraced within the

limits of their present reservation, upon which the cattle of the appellant, now sought to be taxed, are grazing. The substance of this treaty is that they *retained* their occupancy of the lands described therein and relinquished to the United States their right to all other lands occupied by them. The United States agreed that these Indians should have the undisturbed use and occupancy of the lands so retained, and "solemnly" agreed to protect them against the intrusion of all others except such officers, agents, and employés of the Government as were permitted to enter said reservation in discharge of duties enjoined by law. No others were to be permitted "to pass over, settle upon, or reside in the territory prescribed in this article for the use of said Indians."

It is, therefore, clear that these Crow Indians were to have the full benefit of the lands now embraced in their said reservation, unimpaired by any act either of the United States or of Montana. By article 4 of said treaty this reservation was to be the "permanent home" of said Indians. The jurisdiction of the United States was in no way abdicated, nor, by said organic act, was any jurisdiction or control over the Indians or their lands granted to Montana. Article 2 of this treaty creating and defining the limits of said reservation is as follows:

"The United States agrees that the following district of country, to wit, commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude, *shall be, and the same is, set apart for the undisturbed use and occupation of the Indians herein named (the Crows)*, * * * and the United States now solemnly agrees that *no persons* except those herein designated and authorized so to do, and except such officers, agents, and employés of the

Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory prescribed in this article for the use of said Indians.*"

4. This was the condition when, on the 12th of June, 1880, a certain agreement was executed by a majority of all the adult male members of the Crow tribe (*R., p. 29*), agreeing to sell to the Government of the United States, for certain named considerations, a part of said Crow Reservation, which agreement was ratified by act of Congress of May 11, 1882 (*22 Stats., 42*), and in which the following provision appears:

"If at any time hereafter we (the Crows), as a tribe, shall consent to permit cattle to be driven across our reservation or graze thereon, the Secretary of the Interior shall fix the amount to be paid by parties so desiring to drive or graze cattle; *all moneys arising from this source to be paid to us* under such rules and regulations as the Secretary of the Interior may prescribe."

It is under the above agreement that the leases were made and entered into by which the cattle belonging to appellant and the other owners mentioned herein were and now are allowed to be, and graze upon, the lands contained in the said reservation; and it is for the benefit of said Indians, and to them as a tribe, that the money derived from the said cattle owners for said privilege is paid.

5. On the 22d of February, 1889, Congress passed an act "to enable the people of North Dakota, South Dakota, Montana, and Washington to form Constitutions and State governments, and to be admitted into the Union," etc., in which it is provided (*25 Stats., 677*):

"That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying

within the boundaries thereof, *and to all lands lying within said limits owned or held by any Indian or Indian tribes;* and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*"

The design and purpose of Congress to reserve to the Government of the United States, and to exclude from the States to be admitted under the act, the jurisdiction and control of all unappropriated public lands and all lands embraced within the various Indian reservations existing at the time, and to which the title of the Indians was unextinguished, could not be more clearly indicated, or expressed in stronger or more unambiguous language.

6. All the conditions respecting these public and Indian lands contained in the said enabling act were unqualifiedly accepted and agreed to by the Constitutional Convention of Montana of 1889 (*see sec. 2 of ordinance 1*), in which it is said, "*And said Indian lands shall remain, under the absolute jurisdiction and control of the United States.*"

The Constitution of the State of Montana recognize this absence of jurisdiction over reservations within the exclusive jurisdiction of the United States. In art. 2, sec. 1, it is said :

" Provided that there be, and is hereby, reserved to the State the right to serve all legal process of the States both civil and criminal, upon persons and property found within any of said reservations " (meaning certain named military reservations), " *in all cases where the United States has not exclusive jurisdiction.*"

This provision is enforced by sec. 40 of the Political Code of Montana, which provides that—

"The sovereignty and jurisdiction of this State extends to all places within its boundaries as established

by the Constitution, *excepting such places as are under the exclusive jurisdiction of the United States,*" etc.

Having thus established, beyond all controversy, the proposition that the jurisdiction of the United States over the said Crow Indian Reservation is absolute and exclusive in so far as it concerns the government and protection of the Indians and the ultimate disposition of said land, we are now brought to the question whether the land contained in said reservation is without the jurisdiction of the State of Montana for *all* purposes, or whether, on the other hand, the property of third parties located therein can be taxed by the State authorities.

II.

The Government of the United States has exclusive jurisdiction over the Reservation in question, and over the persons and property of the Indians located thereon, and, therefore, neither the State of Montana nor the County of Custer has any jurisdiction or power to assess or collect taxes on account of the cattle grazing upon said Reservation under duly authorized leases from the Indians.

As we have already seen, the act under which Montana was admitted into the Union makes it an *express condition* that all lands lying within the limits of that State "owned or held by any Indian or Indian tribes * * * *shall remain under the absolute jurisdiction and control of the Congress of the United States,*" which condition was assented to in the words hereinafter quoted. We have also shown that, prior to the passage of the said enabling act, the title of the Crows to the land embraced in their said reservation had not only not been extinguished, but that said lands had been *expressly*

excepted from the jurisdiction of the Territorial government by the act under which the Territory was organized, and that the said Indian title was afterwards recognized and confirmed by the treaty creating and defining the reservation in question in this case.

Notwithstanding these provisions, and notwithstanding the provision in said treaty prohibiting all persons from passing over or going upon said reservation except certain officers, agents, and employés of the United States in discharge of the duties enjoined by law, the authorities of the County of Custer assert, and have attempted to exercise, the right and power to tax the property of outside parties lawfully upon said reservation, and to enter the same for the purpose of enforcing the collection of such taxes—and this they attempt to do although the property sought to be taxed is not in any way within the jurisdiction of the County of Custer, although neither the Indians nor the parties taxed derive any benefit from the tax, although the Indians are directly and pecuniarily interested in the matter of the taxation of said property, and although the grazing of cattle upon said reservation under these leases is in the nature of traffic or "commerce" in the sense in which that word is used in the Constitution. The court below sustained the said authorities of Custer County in their contention, and reversed the order of the Circuit Court restraining the collection of said taxes.

This holding of the court below seems to us, in the light of the above statutory and treaty provisions, to be clearly erroneous. It will be remembered that by section 2 of ordinance 1, the Convention that framed the Constitution adopted by the people of Montana agreed and declared that:

"They (the people of Montana) forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying

within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.*"

It seems to us that there is but one construction that can be placed upon the words contained in the last clause of the above-quoted consent that the Indian lands in said State "shall remain under the absolute jurisdiction and control of the Congress of the United States," and that is that they mean that the Government of the United States is to have absolute jurisdiction and control of said lands and of the Indians located thereon *for all purposes*, as well those directly and exclusively concerning the Indians and their lands as those indirectly or in any way connected with or affecting them. It would be absurd to hold that there can be any concurrent jurisdiction in the State, even for the purpose of the taxation of the property of third persons upon said Indian lands, as that would, of course, be equivalent to taxing the Indians themselves.

It can not be that the broad and unrestricted reservation, contained in the said enabling act, of all jurisdiction and control over these Indians and their lands, and the consent thereto of the people of Montana, can be so construed as not to include the exemption from taxation for State and county purposes of the property of outsiders lawfully located upon said reservation under duly approved leases to which the Indians are parties, and from which they derive an extensive annual income, while at the same time the lands and property actually belonging to the Indians themselves are exempt from such taxation. The very words above quoted from the act under which Montana was admitted into the Union have been con-

strued in two well-considered cases, in one of which the exact question now being discussed, of the jurisdiction of the United States over this same Crow Indian Reservation, was involved.

The case to which we have just referred is that of the *United States* v. *Partello* (48 Fed. Rep., 670), and, as it is so directly applicable to the question of jurisdiction presented by the case at bar, we make the following rather full quotation from the opinion of the court, beginning at page 674:

"Let us see what Congress and Montana have done toward conferring the jurisdiction of the United States over the Crow Indian Reservation. In an act entitled 'An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States,' etc., approved February 22, 1889, in reference to the convention in each Territory named, organized to form a Constitution for the proper State, we find the following in section 4:

"'That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction of the Congress of the United States. * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said States taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations.'

"In compliance with this provision of the statute under which Montana was admitted into the Union, the convention that framed the Constitution adopted by the people of Montana provided by ordinance, as follows:"

(Here follows the provision contained in section 2 of ordinance 1, which we have above quoted, and which consents to the above condition of the enabling act in the exact words in which it is stated in said act.)

"*It is evident that the lands referred to in this ordinance, and the lands in the statute mentioned, over which the Congress of the United States was to retain absolute jurisdiction, were the Indian lands to which the Indians held but the right of occupancy.* The question here presented is, what did Congress intend by the clause, 'and said Indian lands shall remain under the absolute jurisdiction and control of the United States,' and what did the convention that framed the Montana Constitution intend by it? *This provision does not occur, so far as I have been able to investigate, in the acts providing for the admission of any other States into the Union than in the one above referred to.* And I am not apprised that any ordinances similar to the one named above were ever adopted by any other States than those enabled to form constitutions under the same act which gave that privilege to the people of Montana. In the first part of the portion of section 4 of said act quoted above, it appears that, as an individual proprietor, the United States was fully protected in regard to its rights to Indian lands, and the Indians were protected in their right of occupancy. * * *

"It was agreed by the ordinance above referred to, that Congress was to retain the absolute jurisdiction and control over these Indian lands within the Indian reservations in Montana. The word 'jurisdiction,' as used in the above clause, when applied to Congress, means the power of governing such lands, to legislate for them, the power or right of exercising authority over them. These are the definitions of this word that will be found in Webster's Dictionary. When we speak of the right to govern certain lands, we not only mean the right to do something with the land itself, but to legislate for and control the people upon said lands, as well as to legislate concerning the land itself."

After referring to the opinion of Justice Miller in the case of the *United States* v. *Ward* (1 Woolw., 17), in which it is held that all territory not excluded from the limits

of the State by treaty is included therein, and after quoting from the treaty with the Crows above set forth the provisions setting apart for the absolute and undisturbed use and occupation of said Indians the lands described, and providing against intrusion, the court proceeds:

"Now, if it should be held that, in the language of Mr. Justice Miller, in *United States* v. *Ward* (*supra*), the act of Congress admitting Montana into the Union awarded it 'all territory which was not covered by such treaties (as that with the Shawnees, which the Crow treaty is not), was included with the State, within its jurisdiction and within its territory, and this irrevocably, unqualifiedly, and exclusively,' what became of this treaty with the Crows so solemnly entered into? In its main features it was broken by that act, with that construction forced upon us. Did Congress intend to do this? *Is it not more reasonable to infer that Congress intended by the clause referred to to reserve the power to observe that treaty and others of a similar character? It does appear to me that not only the language of said clause, but the circumstances which confronted Congress, must have been such as to leave no room to doubt that it was the intention that such Indian reservation as the Crow should be left under the jurisdiction and control of the National Government as long as the lands therein remained Indian lands.* * * * The United States, from the earliest organization of the National Government, have assumed control over the several Indian tribes in the United States, and have denied such control to State governments. In the case of *United States* v. *Kagama* (118 U. S., 375), the Supreme Court held that the Indian tribes were subject to the control of the United States, and could be made subject to its laws; that *the States have no power to subject Indians to their laws as long as the Indians maintain their tribal relations;* that the Indians owe no allegiance to the States within which their reservations may be established, and the State gives them no protection. * * *

"It is urged that, while the United States could have jurisdiction over such lands as far as the Indians are concerned, it would have no right right over white men

found within an Indian reservation such as the Crow Reservation. *The statute and the ordinance we have been considering say the jurisdiction and control is absolute, not a divided jurisdiction and control, and it would seem to me that this is proper. Any other view would bring on collisions between the authorities of the two governments.* * * * The Crow Indian Reservation, notwithstanding the act admitting Montana into the Union, remains Indian country, absolutely within the jurisdiction of the United States."

In the case of the *United States* v. *Ewing* (47 Fed. Rep., 813), the court said:

"It was argued by counsel that the reservation of absolute jurisdiction and control over the Indian lands contained in the omnibus act" (the one in question in the case at bar) "is to be confined to the mere matter of the ownership of the title and control of the right of taxation, but such limited construction is not admissible. *The reservation was meant to be as broad as the duty which the United States assumed in regard to these lands, which was to secure to the Indians the peaceful possession thereof as their home, and to protect their persons and property thereon.*"

The exact question that is now presented by the case at bar is one which has never been decided by this court. Cases have arisen in which was involved the question of the jurisdiction of Federal and State courts over the lands embraced in the various Indian reservations throughout the country, and over the persons and property of others than Indians found thereon, but we contend that, by reason of the special and peculiar character and purport of the provisions contained in the treaty and several statutes involved in the case now at bar, the court below erred in not holding that the authorities of the County of Custer had not jurisdiction to assess and enforce the collection of taxes upon the property of the appellant located upon the Crow Reservation under the leases aforesaid.

The case of the *United States* v. *McBratney* (104 U. S., 621), appears to be the one principally relied on in support of the proposition that the State authorities have jurisdiction over the persons and property of white persons located upon Indian reservations. That was a case in which this court decided that the Circuit Court of the United States for the District of Colorado had no jurisdiction of an indictment against a white man for the murder of another white man in the Ute Reservation. It is true that the treaty establishing the Ute Reservation contains substantially the same language, in the provision creating the reservation, as the one with the Crows in the case at bar; but it will be seen that the act under which the Territory of Colorado was organized *only* provided for the exception from its territorial limits and jurisdiction of "all territory which, *by treaty* with any Indian tribe, was not, without its consent, to be included within the territorial limits or jurisdiction of any State or Territory," while the organic act of the Territory of Montana *also excepts* from its jurisdiction "the rights of person and property now pertaining to the Indians in said Territory *so long as such rights shall remain unextinguished by treaty.*"

The case of the *United States* v. *Kagama* (118 U. S., 375) simply holds that the 9th section of the act of March 3, 1885, making it a crime for one Indian to murder another upon a reservation situated wholly within the limits of a State, etc., is valid and constitutional. The court says that *this act* "does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon the white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation." This is merely a decision that *the act in question* does not interfere with whatever jurisdiction the State might have. The court does not

hold generally that *all* States have jurisdiction over white persons in *all* Indian reservations, even when excluded from their jurisdiction *otherwise* than by treaty, as we contend the Crow Reservation is in the case at bar.

So in the case of *United States* v. *Thomas* (151 U. S., 577), a Chippewa Indian was indicted for the murder of another Indian on the Chippewa Reservation. This court held that the United States court had jurisdiction to try the case, and repeats the language of *United States* v. *Kagama* last above quoted. But in the act under which Wisconsin became a State (*9 Stats., 56*), there is no reservation of Indian lands from its jurisdiction, and in the treaty with the Menomonees the Indians are merely granted a home upon the land in dispute, and no provision is made for the exclusion of their land from State or Territorial jurisdiction, as in the present case.

The case of *Langford* v. *Monteith* (102 U. S., 145), holds that where an act admitting a State provides, in accordance with treaty stipulations, that the lands in the possession of an Indian tribe shall not be a part of such State or Territory, the new government has no jurisdiction over them, and the court says that "where no such clause, *or language equivalent to it*, is found," the lands held by the Indians are a part of the Territory, and subject to its jurisdiction, although the Indians themselves are exempt therefrom. The lands of the Crows in the case at bar were expressly reserved from the jurisdiction of the Territory by the act under which it was organized, as we have shown, and were afterwards excluded from the jurisdiction of the State of Montana by the said enabling act.

The case of the *Utah and Northern Railway* v. *Fisher* (116 U. S., 28) is one in which this court held that the Fort Hall Indian Reservation, in the Territory of Idaho, was not excluded from the limits of the Territory by the act creating it, which act contained substantially the

same provisions as the act under which the Territory of Montana was organized; but the act admitting Idaho into the Union (*26 Stats., 215*) contains no reservation of Indian lands from the jurisdiction of the State, as does the enabling act in the present case. Justice Field, in delivering the opinion of the court, after saying that to uphold the jurisdiction of the Territory "in all cases and to the fullest extent, would undoubtedly interfere with the enforcement of treaty stipulations, and might thus defeat provisions designed for the security of the Indians," adds:

"But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters *not interfering with that protection.* It has, therefore, been held that process of its courts may run into an Indian reservation of this kind *where the subject-matter or controversy is otherwise within their cognizance.*"

The decision in this case was, however, based upon the proposition that as the several strips of land belonging to the railroad and sought to be taxed *had been ceded to the railroad by the United States*, they were consequently *withdrawn from the reservation* "and thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed." This decision has no application whatever to the case at bar, because, in the case at bar, the property sought to be taxed is confessedly upon the Crow Reservation, on lands that have in no way been withdrawn therefrom, and is therefore under duly executed leases from the Indians themselves, authorized and approved by the Government of the United States. The subject-matter in controversy, in the present case, would, for this reason, not be otherwise within the cognizance of the

courts of the State, the Indians being parties to the leases under which the property sought to be taxed is upon this reservation.

The case of the *Maricopa and Phœnix Railroad Company* v. *Arizona Territory* (156 U. S., 347), recently decided by this court, is almost precisely the same as that last above cited of *Utah and Northern Railway* v. *Fisher*. It merely holds that when Congress grants to a railroad company organized under the laws of a Territory a right of way over an Indian reservation within the Territory, and the road is constructed entirely within the Territory, that part of it within the reservation is subject to taxation by the Territorial government. The opinion by Justice White is based upon the same grounds as those upon which Justice Field based his opinion in said case of *Railway* v. *Fisher*.

The cases to which attention has just been called are the only cases decided by this court which we have been able to find in which the question of the jurisdiction of the Federal, State, or Territorial authorities has been discussed or considered; and from them it will be seen that, while it seems to be a settled rule that where Indian reservations are not expressly excluded from the limits of any State or Territory by treaty, or otherwise, they are within the jurisdiction of the State or Territory as to matters not affecting the rights or protection of the Indians, it also appears to be equally well settled that where the persons or rights of Indians occupying such reservations are in any way affected or involved by the transaction in controversy, there the matter is within the sole and exclusive jurisdiction of the United States.

It must be kept in mind, however, that, in the case at bar, while it is true that the cattle sought to be taxed are the property of outsiders, yet these cattle are allowed to graze upon this Crow Reservation under express agreements with, and authority from, the Indians them-

selves, with the approval, of course, of the United States. Under the terms of the leases executed in pursuance of this purpose, the Indians receive from the various lessees large sums of money, amounting, in the aggregate, to an extensive annual income. The Indians are themselves parties to, and are pecuniarily benefited by, these leases, as are the persons who would be compelled to pay the tax if the jurisdiction of the authorities of Custer County to assess and collect the same is sustained, and we do not, therefore, see why this matter is not within the sole and exclusive jurisdiction of the United States.

III.

The tax in question is in violation of the provision of the Constitution of the United States, that "Congress shall have power to regulate commerce with Foreign Nations, and among the several States, and with the Indian Tribes."

The lands in question in this case were subject to the "undisturbed use and occupation" of the Indians, and were set apart for their exclusive enjoyment and benefit. One of the modes of securing a "benefit" therefrom is by means of a rental of said lands under leases for grazing purposes, as provided for in the agreement which was so embodied in, and ratified by the act of Congress of April 11, 1882 (*22 Stats.*, *42*). This mode of obtaining such benefit from said lands Congress has regulated, as we contend, under the provision of the Constitution above quoted.

"Traffic" is "commerce" (*Gibbons* v. *Ogden*, 9 Wheat., 1; *United States* v. *Holliday*, 3 Wall., 407). Dealing with the Indians with reference to the utilization of their lands is traffic—commerce—which Congress alone may regulate, and in this case has regulated. It is not nec-

essary, in order to bring the case within this constitutional provision, that the traffic shall begin outside, and end or continue inside, the Indian reservation, or *vice versa*. It may begin or end in, or be wholly confined to, that territory, and yet it is commerce over which Congress has the exclusive jurisdiction. (*United States* v. *Holliday*, 3 Wall., 418, *supra*.)

The grazing of cattle upon these lands being a special means provided by Congress for utilizing them for the benefit of the Indians, it is not within the power of a State or county to tax that instrumentality. A State can not tax the bonds of the United States for familiar reasons; and it is submitted that, upon precisely the same principle, these cattle can not be taxed. The cattle are inseparably connected with the use and benefit derived from said lands, and it is, of course, impossible to subject them to taxation without impairing this use and benefit.

Therefore, Congress having regulated this commerce or traffic, and having the sole jurisdiction over the same, no interference with this right, by the State or county authorities, directly or indirectly, is permissible.

IV.

The court below was clearly mistaken in assuming that the Indians were in no way interested in the cattle sought to be taxed.

In the opinion of the court below it is admitted that, "so far as concerns the government and protection of the Crow Indians, and for all purposes relating to the treaty and agreements between that tribe and the United States, the reservation in question is within the sole and exclusive jurisdiction of the United States;" but the court adds:

"We are unable to see any good reason why the authority of the State, and its subordinate subdivisions,

the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the reservation in question, *provided, as in this case, the Indians are in no way interested in it.* * * * As this is the only question presented for decision, the order enjoining the State authorities from proceeding with the collection of the taxes in question is reversed."

As has been above shown, the cattle in question in this case were and are lawfully upon a part of the land embraced within the limits of the Crow Reservation, under certain leases duly executed on behalf of the said Indians and approved by the proper authorities of the United States, in accordance with the terms of the above agreement set forth, which leases will be found on file in the office of the Commissioner of Indian Affairs. With these leases the State of Montana had, and could have, nothing whatever to do, they being transactions exclusively between the lessee on the one hand and the Indians, with the approval of the United States, on the other. The money paid thereunder was and is paid directly for the benefit of the Indians, and to them as a tribe.

These Indians, since the year 1889, have received, and now receive, from the appellant, as compensation for the use of their land for the grazing thereon of cattle, as aforesaid, a yearly income of nearly $7,000, of which they would undoubtedly be deprived, or which would be reduced to the extent of the tax, should the collection of the taxes so assessed by the authorities of Custer County be enforced—this because the principal and only reason for the leasing of land in that particular locality or reservation is, of course, the supposed exemption of said cattle from taxation. The price paid by the appellant for this privilege is approximately the same as that which would have to be paid for the same privilege to private parties owning land suitable for that purpose, and if appellant,

in addition to the $7,000 paid as rent under said leases, were compelled to pay taxes upon its cattle averaging about $3,000 a year, there would, obviously, be no particular reason why the lands contained in said reservation should be leased. Other lands much nearer the market, or affording better facilities for transportation might, and undoubtedly could, be obtained.

The appellant is not a citizen of the State of Montana, and the land upon which the property sought to be taxed is expressly excepted from the jurisdiction of the State, not only by the act under which it was admitted into the Union, but also by its Constitution and laws. The only means by which the Indians can derive a revenue from their lands (except as a result of their own labor or industry) is by leases such as those made to the appellant in this case, and the fact that it is the property of third parties that is taxed, and not the land itself or the income arising directly from its use, does not justify the assertion that the Indians are in no way interested in the property taxed. They would be much less interested in it if the amount of the tax were deducted from the amount paid under the lease, because in that event they would only lose a portion of their income, while, if the cattle owners are compelled to pay a tax on their cattle in addition to the amount they are obliged to pay for rent, the Indians might lose the whole amount of such income, or it would at least be reduced to the extent of the amount paid for such taxes, and thus the very object for which the said agreement was made and ratified by the Congress of the United States, would be defeated, and the plan devised by the Government for providing a revenue for these Indians would be set at naught, by reason of which they would be made, perhaps, an additional burden upon the United States.

It is, therefore, clear that this tax upon the cattle grazing upon said land under the leases aforesaid *is a*

tax upon the right of the Indians to lease the same, and, to the extent of the tax, decreases the rental value of their lands, if it would not entirely destroy it. Anything that has a tendency to deprive the Indians of the full and unrestricted use and benefit of their lands, or to affix any servitude thereon, is against the settled policy of this Government and detracts from the rights of the Indians themselves. Of course the taxation of cattle brought into the Indian country for grazing purposes, and for which privilege an adequate compensation is paid, is a servitude that decreases such rental value, in fixing which it has the same effect that a tax on land itself would have, and to that extent, at least, diminishes the income of the tribe. All the authorities upon the subject, including those we have above cited, hold that the State would have no power to tax any portion of the land itself, nor would it have any power to tax the personal property of the Indians, and no such attempt has ever been made with regard to the property of the Crows; and we, therefore, submit that the State of Montana can not do indirectly what it could not do directly.

In the case of *Pollock* v. *Farmers' Loan and Trust Company* (157 U. S., 429) this court held that a tax on the rents or income of real estate is a direct tax, or, in other words, a tax on the real estate itself—that land independently of its produce has no value. Therefore, any tax that affects the rental value of the land which the Indians have the sole right to use and enjoy, to the extent of the tax, is a tax upon the land itself, and the Indians certainly can not be said to have no interest in the specific property taxed if its taxation affects the value of their income to the extent of the amount of such tax, or totally destroys it. In the opinion of the Chief Justice in this income tax case, at page 580, it is said:

"As, according to the feudal law, the whole beneficial interest in the land consisted in the right to take the

rents and profits, the general rule has always been, in the language of Coke, that 'if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery of *seizen secundum formam chartæ*, the whole land itself doth pass. *For what is the land but the profits thereof?*' Co. Lit., 45. * * *

"The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income, which is the incident of its ownership, belongs to the other? We are unable to perceive any ground for the alleged distinction. *An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.* This law taxes the income received from land and the growth or produce of the land. Mr. Justice Peterson observed in Hylton's Case, '*land, independently of its produce, is of no value,*' and certainly had no thought that direct taxes were confined to *unproductive* land.

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions can not be thus evaded. *It is the substance and not the form which controls,* as has, indeed, been established by repeated decisions of this court. Thus in *Brown* v. *Maryland* (12 Wheat., 419, 444) it was held that the tax on the occupation of an importer was the same as a tax on imports, and, therefore, void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that *a tax on the sale of an article* imported only for sale *is a tax on the article itself.*'"

This case of *Pollock* v. *Farmers' Loan and Trust Company* seems to us to be absolutely conclusive of the case at bar. If the lands and property of the Crow Indians

are exempt from State and county taxation, and if "an annual tax upon the annual value or annual user of real estate" is the same, in substance, as a tax upon the real estate itself, then, of course, any tax assessed by a State or county upon the property of third persons located upon the lands of the Indians and from which they derive an annual income, is a tax upon said Indian lands, or, which is the same thing, upon the right of the Indians to lease the same, and is, therefore, void and beyond the jurisdiction or power of such State or county authorities to enforce the collection of. A tax upon the use of land which can only be used for a certain purpose, or a tax upon the means by which the land is so used, is certainly equivalent to a tax upon the land itself, and, therefore, under the principles so often asserted by this court, is void.

V.

The tax assessed and sought to be collected in the present case is invalid because not pertaining in a special and peculiar manner to the district within which it is levied, and because not concerning the people of that district more particularly than it does others.

The facts in the case at bar present a plain case of taxation without representation or resulting benefit to the persons taxed. Even if it can be said that the reservation in question is attached to the County of Custer for judicial purposes (which we deny), it is conceded that the authorities of said county would have no right to tax the property of the Indians upon said reservation. Taxation is not a judicial act, but a legislative one. The distinction between legislative and judicial acts is stated by Justice Field in the *Sinking Fund Cases* (99 U. S., 700) where he says, "The one determines what the

law is, and what the rights of the parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."

The constitution of Montana says (article 12, section 2), that the property of the United States shall be exempt from taxation. In section 11 of article 12 it is provided "that taxes shall be levied and collected by general laws and for public purposes only," and that "they shall be uniform upon the same class of subjects *within the territorial limits of the authority levying the tax.*" We have already shown, we think, that the Crow Indian Reservation is not "within the territorial limits" of Custer County, within the meaning of those words in the said State Constitution, and in the statutes to which we have referred. In addition to this, it is obvious that neither the owner of the land (the United States), the occupants thereof (the Indians), nor the parties owning the property taxed, can derive any benefit whatever from the expenditure of the amount realized from such taxation. They are not represented in the Legislature or county board, they have absolutely no voice in its expenditure, and they receive no protection from the State or county laws.

If a theft is committed of any of the cattle or property of the appellant by Indians upon the reservation, it is to the United States that the appellant must look for redress and punishment of the guilty party, and not to the State of Montana. If a road were desired through a certain portion of the reservation upon which the cattle are located, the United States or the Indians themselves would have to construct it; the County of Custer would not. If the occupants of the Reservation desired an additional school house, or a court established, or a public building erected, or if any of the benefits were conferred upon the Indians or their country that are

within the usual power of the commonwealth to grant, they could not be obtained from the State of Montana or the County of Custer, but must be provided by Congress or by the Indians themselves; and yet it is sought to compel these Indians, in the indirect way above stated, to contribute to the revenues of Custer County, in return for which they would derive no benefit or protection whatever therefrom.

In Cooley on Taxation (2d edition), chap. 5, p. 140, the author states the general rule upon this subject as follows:

"In the preceding chapter we have endeavored to show that in order to give validity to any demand made by the State upon its people under the name of a tax, it is essential that the purpose to be accomplished thereby shall be public in its nature. *But it is equally essential, as there intimated, that the purpose shall be one which in an especial and peculiar manner pertains to the district within which it is proposed that the contribution called for shall be collected, and which concerns the people of that district more particularly than it does others.* The Federal Constitution recognizes this principle in the provisions it makes to prevent the Federal Government from indirectly imposing its support upon one or more of the States to the relief of others." (See article 1, section 8, clause 1; section 9, clause 4, 5.)

On pages 143 and 144 the author continues:

"The general rule of restricting the levy of a tax to the very district concerned, but making it embrace the whole district, is so plain and reasonable that it is not likely to be overlooked or disregarded except in cases in which the facts are such as to raise doubts as to its application."

In its application to the facts in the case at bar, this elementary rule of taxation clearly forbids the assessment or collection of a tax such as that sought to be collected from the owners of cattle upon the Indian reser-

vation in question, it being entirely outside the jurisdiction of the authority levying the tax, at least for all legislative purposes. This principle is recognized in innumerable cases.

See, for instance—

Dorgan v. *City of Boston*, 94 Mass., 234;
Lexington v. *McQuillan's Heirs*, 9 Dana, 514.

In the case of *Wells* v. *City of Weston* (22 Mo., 384), it was held that the Legislature could not authorize a municipal corporation to tax, for its own purposes, lands lying beyond its corporate limits.

See, also—

Cheaney v. *Hooser*, 9 B. Monroe, 341;
State v. *Haben*, 22 Wis., 620;
Milwaukee v. *Milwaukee*, 12 Wis., 93;
County Court v. *Illinois*, 58 Ill., 456;
Sleigt v. *People*, 74 Ill., 47;
Sharpless v. *Mayor of Philadelphia*, 21 Pa. St., 172;

In the last cited case of *Sharpless* v. *Mayor of Philadelphia* (21 Pa. St., 172), the court says:

"An act of the Legislature authorizing contributions to be levied for mere private purposes, *or for a purpose which is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another.*"

See, also—

Washington Avenue (69 Pa. St., 361);
Baltimore v. *Hughes*, 1 G. & J. (Md.) 491;
Dyer v. *Farmington Village*, 70 Me., 522;
Hammett v. *Philadelphia*, 65 Pa. St., 146;
Tidewater Co. v. *Carter*, 3 C. E. Green, 518;

McCormick v. *Petchin*, 53 Mo., 33;
Sutton's Heirs v. *Louisville*, 5 Dana, 28;
Ex parte Marshall, 64 Ala., 266;
Lin Sing v. *Washburn*, 20 Cal., 534;
Burroughs on Taxation, 68, 392;
Morford v. *Unger*, 8 Iowa, 82;
Town of Flatbush, 60 N. Y., 398;
Ryerson v. *Utley*, 16 Mich., 276;
Desty on Taxation, 26;
Black on Constitutional Law, 328.

In the case at bar, the effort is to tax the cattle grazing upon this Indian reservation, which, as we have shown, operates, perhaps indirectly, as a tax upon the Indians themselves. The moneys realized upon the said tax, if collected, must in the nature of things be used for the benefit of the people of Custer County, outside of the Crow Reservation, and must be applied to the purposes for which such taxes are collected, to wit, schools, roads, public buildings, the maintenance of the county organization, etc., in which neither the Indians nor the owners of the cattle taxed have any interest whatever, and from which they derive no benefit, or must be used for State purposes, for the benefit of the citizens of the State, in which also these Indians and their lessees have no interest, and to which they owe no allegiance.

In other words, it is an attempt to tax property in a jurisdiction over which the Government of the United States has exclusive control, to tax property located upon lands of which the Indians are guaranteed by the treaty and statutes above set forth the sole and exclusive use and benefit. And this tax confers, and could confer, no benefit whatever upon these Indians or their lessees, either directly or indirectly, and is of benefit alone to the people outside of said reservation in the County of

Custer, so far as the taxes are for county purposes, and in the State so far as they are for State purposes. It is, therefore, clearly taxation without representation, and without any resulting benefit to the parties taxed, and as such can not lawfully be levied and collected.

Upon all the grounds aforesaid, we respectfully submit that the decree of the Circuit Court of Appeals should be reversed, and that the order of the Circuit Court restraining the collection of said tax should be restored to full and perpetual force and operation in the premises.

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STEPHEN CARPENTER and
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Of Counsel.

165-719

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1896.

THE HURLBUT LAND AND CATTLE CO., A CORPORATION,
Appellant,

vs.

JOHN S. TRUSCOTT, COUNTY TREASURER OF CUSTER COUNTY MONTANA,
Appellee.

No. 512.

Appeal from the Circuit Court of Appeals of the United States for the Ninth Circuit.

BRIEF FOR RESPONDENT.

J. W. STREVELL,
Attorney for Appellee.

C. H. LOUD, and
T. J. PORTER,
Of Counsel.

YELLOWSTONE JOURNAL, MILES CITY, MONT.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE HURLBUT LAND AND CATTLE COMPANY, (a corporation), Appellant,

vs.

JOHN S. TRUSCOTT, County Treasurer of Custer County, Montana, Appellee.

No. 512.

Appeal from the Circuit Court of Appeals of the United States for the Ninth Circuit.

BRIEF FOR RESPONDENT.

Statement.

If redundancy shall appear in the statement of facts out of which this transaction grows, the apology for it will be found in the fact that respondent, at the time of preparing this brief, has not been able to see the brief of appellant. The matters in-

volved in this contention may be briefly summarized as follows:

The County of Custer is, and for a long time prior to anything involved in this contention, was a corporate county, first within the Territory, and later within the State of Montana.

Montana was organized as a Territory by an Act of Congress approved May 26, 1864, (*13 Stats. at Large, p. 85*).

At the time of the passage of the Act creating the Territory, there existed no treaty between the United States and the Crow Indian Tribe prohibiting any part of the present Crow Indian Reservation from being included within its Territorial limits without the consent of the Tribe.

While perhaps not particularly bearing upon the question involved in this contention, it will not be improper to remark at this point, that a part of this original Crow Indian Reservation was ceded to the general Government in the year 1882 by an Act of Congress found at Page 42 of the Laws of 1881-1882; there is, however, no contention nor denial of the fact that the *Reservation* on which the property sought to be taxed in this case, was at all times when assessments upon the same were made, within the boundaries of the State of Montana and within the boundaries of the County of Custer as such boundaries are established by State and Federal Legislation, and is now so situate at the time that the taxes are sought to be collected.

This Reservation is claimed by the respondent to be within the jurisdiction of the County of Custer and within the State of Montana for all the purposes of taxation of the property of white per-

sons situate upon said Reservation. The County of Custer has, at all times since the year 1889, assessed the property of white persons situate upon this Crow Indian Reservation, but thus far has not been able to collect such taxes.

The taxes of the complainant corporation involved here, were assessed for the years 1890 and 1894, and the taxes due for the year 1890 are the sum of $3,237.53, and for the year 1894 $2,701.33, making in all as taxes due from the appellant corporation $5,938.86, and due from all persons assessed on the said Reservation, the complainant alleges, $110,000.00. In reality, there is due the County of Custer for taxes assessed upon all the property upon the said Reservation, in case such assessments were legal, about the sum of Two hundred thousand dollars.

The appellant in this action is the Treasurer of the County of Custer, and as such, is ex-officio collector of taxes for his County.

The taxes of the persons assessed for property upon the Reservation were never paid, and the respondent in this action as such collector was proceeding to collect the taxes by distraint of property, when the complaint in this action was filed and the order granted restraining him from in any way interfering with the property of the appellant for the purpose of collecting the tax.

The appellant and all others in like condition with property situate upon the Reservation, denies the authority of the County of Custer, either to assess or collect taxes on the said Reservation, on the ground that the Reservation is within the sole and exclusive jurisdiction of the United States

and not at all within the jurisdiction of the County of Custer or the State of Montana.

The Trial Court sustained the appellant in this view, and granted an injunction restraining respondent from in any way proceeding to collect the tax. The respondent denies this contention and appealed from the order of the Trial Court granting the injunction to the Circuit Court of Appeals for the Ninth District, where the action of the Trial Court was reversed, and the injunction dissolved; from the latter judgment this appeal is taken.

Nothing is involved in this action relating to the details of assessing the tax, nor of the manner or authority to collect the same, provided the County of Custer has jurisdiction to assess and collect taxes for property situate on the said Reservation.

It is alleged in the answer and not disputed, that the County of Custer is a corporate County within the State of Montana.

That the Crow Indian Reservation is, and was at all times when the taxes sought to be collected were assessed, within the boundaries of the said County as such boundaries are established by law.

That the property assessed by the authorities of the County was at all times when assessed, the property of white persons having no connection at all with any Indian or Indian Tribe.

That the property of the appellant and of all persons and corporations whose taxes the respondent seeks to collect, was at all times when assessed upon the said Reservation, within the boundaries of the County of Custer as such boundaries are established by law.

That the Assessors of the County in the several years in which assessments were made, demanded property lists for the assessment of such taxes, which were refused.

That ineffectual attempts had been previously made to collect the taxes by distraint, which had been rendered abortive by reason of the resistence of owners of the property acting in collusion with the Indians and those in charge of the Indian Reservation, to resist such collection.

That the assessments of persons and property upon the Reservation have always been at the same rate and the same valuation as assessed upon all other property of like kind and value within the said County.

That the defendant is the elected and qualified Treasurer, and as such ex-officio collector of taxes for the said County, and that he now has the warrant for the collection of such taxes within the said County, as required by law. These things are all admitted.

ARGUMENT.

The constitution of the State of Montana in relation to revenue provides as follows:

"ARTICLE XII.

"REVENUE AND TAXATION.

"Section 1. The necessary revenue for the support and maintenance of the State, shall be provided by the Legislative Assembly, which shall levy a uniform rate of assessment and taxation of

all property except that specially provided for in this article.

"Sec. II. The property of the United States, the state, counties, cities and towns, school districts, municipal corporations and public libraries, shall be exempt from taxation, and such other property as may be used exclusively for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of public charity may be exempt from taxation.

* * * *

"Sec. VI. The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state doing business therein shall be subject to taxation for state, county, school, municipal and other purposes on real and personal property owned or used by them and not by this constitution exempt from taxation."

A portion of the taxes now sought to be collected was levied on property in the year 1889, the same year that Montana came into the Union, but the levy was made under Territorial laws which were retained in force after the constitution was adopted.

The paragraph which we quote below is found in the Laws of the 16th Session of the then Territorial Legislature of Montana, at page 219 and reads as follows:

"All real and personal property in the Territory (or state), except such as in this section is exempt from taxation, shall be taxed and assessed on the first of April preceding its assessment * * * the provisions of this section shall be construed to apply to all the taxable property

within the exterior limits of the territory or state, including all property situate upon Indian, or Military Reservations.

"When the owner of stock does not reside on the range where the stock is, the property shall be assessed in the county where the range is situate."

Revenue Laws of the State of Montana for the year 1891.

Section 2, provides as follows:

"Section I. All property in the state is subject to taxation except as provided in the next section."

"Sec. II. The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, and such other property as is used for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, institutions of public charity, are exempt from taxation; provided no more land than is sufficent for said purposes shall be exempt."

"Sec. XIII. The assessor must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at twelve o'clock m, of the first Monday of March next preceding."

The allusion to the State Board of Equalization made in these sections is simply a provision to the effect, under a clause of the constitution, that the State Board of Equalization shall assess railroad property operated in more than one County of the

State, while other property is assessed by the County Assessor.

"Section 14. The assessor must require from each person a statement under oath setting forth all the real and personal property owned by such person or in his possession, or under his control at twelve o'clock m. on the first Monday of March.

"Sec. 17. Every person who refuses to furnish the statement hereinbefore required, and to make and subscribe such affidavit respecting his name and place of residence, for each and every refusal as often as the same is repeated, forfeits to the people of the state the sum of one hundred dollars, to be recovered in an action brought in the name of the State of Montana in any police or justice court.

"Sec. 18. If any person after demand made by the assessor, neglects or refuses to give under oath the statement hereinbefore provided for, or to comply with the requirements of this act, the assessor must note the refusal on the assessment book *and must make an estimate of the value of the property of such person.*

"Sec. 28. The property of every firm or corporation must be assessed in the county where the property is situated, and must be assessed in the name of the firm or corporation."

Sections. 134, 135 and 136 provide in substance: "The Treasurer may after the third Monday in each year in each of the counties of this state, collect the tax due on personal property by seizure and sale of any personal property owned by the delinquent.

"The sale must be at public auction, and of a sufficient amount of the property to pay the taxes, percentage and costs.

"The sale must be made after one week's notice

of the time and place thereof given by publication in a newspaper or by posting in three public places."

It is not deemed important here to quote at length the early statutes of the State and Territory creating the County of Custer and locating the Crow Indian Reservation within the boundaries of that County. It will be sufficient to say, that the matter was fully adjudicated in,

> *The Board of Commissioners of Yellowstone County* v. *The Northern Pacific Railroad Co., and the Commissioners of Custer County,* (10th Montana, 414.)

It is believed that the foregoing will constitute a sufficient statement of the matters which pertain to Custer County to render the presentation of the situation intelligible to the court. This will lead us to a discussion of the question of jurisdiction over this Indian Reservation as between the State of Montana and the general government.

The attitude which the general government sustains toward the Indian race in this country, it is not necessary to discuss in this presence; the discussion upon that subject has been so long and so ample that if it is not now understood, anything we might hope to say would scarcely render it more so; but the question is understood: they are "wards of the nation, a dependent people:"

This doctrine while not so amply stated, is yet as clearly announced, perhaps more clearly in the case of *United States* v. *Kagama,* (118, U. S. 375,) than anywhere else. The position there assumed is reaffirmed in *United States* v. *Thomas,* (151 U.

S. 577,) but the position there maintained is, that the exclusive jurisdiction claimed by the general government, operates on the Indian as a *person*, and that the necessity for this jurisdiction arises from obligations having their origin in the very foundation of the government toward a frail and dependent race, a race who were inhabitants of this country before we wrested its jurisdiction from a foreign power. This is the ground alleged for this exclusive jurisdiction on the part of the general government; but in all the cases where that jurisdiction is assumed, the most explicit care is taken by the great tribunal rendering these decisions to guard against any false impression that this jurisdiction is intended to apply to white persons within the bounds of a state, even though they be upon an Indian Reservation; and here we might properly pause to ask, where is the decision by the court of last resort in this country, denying to a state jurisdiction over white persons found upon an Indian Reservation within the bounds of any state in this Union? The answer is, that no such decision has ever been rendered under conditions such as are now before this court. Such a decision was attempted to be maintained by the Lower Court in, *United States* v. *Berry*, (4 Fed. Rep. 779,) but this decision was promptly repudiated in *United States* v. *McBratney*, (104, U. S. 621.)

We beg now to call the attention of the court to a number of decisions rendered in this court and also to some decisions from State courts of great learning where the position assumed by the Court of Appeals for the Ninth District, whence this case comes, is fully sustained.

In *United States* v. *Kagama*, (118 U. S. 375,) to which we have already referred, the court distinctly say, at page 383, while holding jurisdiction over the Indian:

"It does not interfere with the process of the State courts, within the Reservation, nor with the operation of State laws *upon white people* found there. Its effects are confined to the acts of the *Indian* of some tribe, of a criminal character within the limits of the Reservation."

In *United States* v. *Thomas*, (151 U. S. 575,) the court is careful again to use this exact language in order to show distinctly that the exclusive jurisdiction over the Indian "is not intended at all to apply to white men found upon the Reservation, nor to interfere with the execution of State laws upon white men within the bounds of the Reservation."

Langford v. *Monteith*, (102 U. S. 145,) arose in Idaho while it was under Territorial condition. That action was a civil suit commenced before a Justice of the Peace, and involved the right of civil process under the Territorial Laws to run within the bounds of such Reservation. In rendering that decision the court say:

"Where any such clause or language equivalent to it is found (referring to the clause in the treaty forbidding it to be included within any State or Territory) in a treaty with the Indians within the exterior limits of Idaho, all lands held by them are a part of the Territory and subject to its jurisdiction, so that process may run there, though the Indians themselves may be exempt from that jurisdiction. As there is no such treaty with the Nez Perce tribe on whose Reservation the premises in dispute are situate, and as this is a suit between

white men, citizens of the United States, the Justice of the Peace had jurisdiction of the parties if the subject matter was one of which it could take cognizance."

United States v. *McBratney*, (104 U. S. 621), arose in the State of Colorado and was a criminal action against a white man for the murder of a white man on the Ute Reservation situate wholly within the exterior limits of the State of Colorado. The prosecution was had in the Circuit Court of the United States, and came to this court on certificate of division upon the question whether the Federal Court had jurisdiction. The treaty under which this decision was rendered was in all *material* particulars identical with the Crow Indian treaty by which the Reservation in question is held. There is no condition found anywhere in this treaty that the Reservation shall not be included within any State or Territory without the consent of the Indians. In the case last cited the court say:

"The State of Colorado by its admission into the Union by Congress upon an equal footing with the original states in all respects whatever, without any such exception as had been made with the Ute Indians, and in the act establishing a Territorial government has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the Territory within its limits, including the Ute Reservation; and that Reservation is no longer within the sole and exclusive jurisdiction of the United States."

In *United States* v. *Kagama*, to which allusion has already been made, the court further discussing the question of jurisdiction say:

"It will be seen at once that the nature of the offense (murder) is one which in almost all cases

of its commission is punishable by the laws of the United States within the jurisdiction of its courts. The distinction is claimed to be, that the offense under this statute is committed upon a Reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is, that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the jurisdiction nor with the operation of State laws upon white people found there. Its effects are confined to the acts of an *Indian* of some tribe, of a criminal character committed within the limits of the Reservation."

The case of *Fisher* v. *Ute Northern Railroad Company*, (116 U. S. 28,) arose in Idaho while it was a Territory. It involved the right to tax property situate upon Fort Hill (Hall) Indian Reservation, a Reservation held by Indians under treaty stipulations exactly the same as those contained in the Crow Indian treaty, and was made the same year as the Crow Indian treaty. In this case the court discuss fully the effect to be given to treaty stipulations such as are contained in the Crow Indian treaty, and at page 31 say:

"It is contended by plaintiff that these treaty stipulations cannot be carried out if the laws of the Territory are enforced on this Reservation; and in support of this position special emphasis is placed upon the clause touching wrong doers among the Indians. As these treaties have the force and effect of a law it is insisted that the Reservation is excluded from the general jurisdiction of the Territory as effectually as if the Reservation was made in specific terms. To uphold that jurisdiction in all cases and to the fullest extent, would undoubtedly interfere with the treaty stipulations, and

might thus defeat provisions designed for the security of the Indians; but it is not necessary to insist upon such general jurisdiction, for the Indians to enjoy the fullest benefit of the stipulation for their protection.

"The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has therefore been held that process of its courts may run into an Indian Reservation of this kind, where the subject or controversy is otherwise within their cognizance."

In *Phoenix & Maricopa Railroad Company*, (26 Pac. Rep. 310,) the Supreme Court of Arizona discuss with very marked ability, and collate with very great pains the authority for taxing property of white persons upon an Indian Reservation. The authority to tax in that case was fully sustained. The case came by appeal to this court and the holding of the lower court was affirmed in *Maricopa & Phoenix Railroad Company* v. *Arizona Territory*, (156 U. S. 347.)

Another case of marked importance by reason of its having been so recently decided is the case of—

Torry v. *Baldwin, County Treasurer*, (26 Pac. Rep. 908) decided in the Supreme Court of Wyoming.

In the case last cited the reasons for taxation are so cogent and irresistable that the court overturns two decisions before rendered in that jurisdiction and say that the position assumed in those cases holding that the property of white persons upon such Reservation could not be taxed is utterly unsound on both principal and authority. In conclusion of the discussion the court say:

"We answer the question reserved and sent us as follows; the County of Freemont had in the year 1889 full right, power, and authority to assess for taxation, and levy a tax upon cattle and horses of the plaintiff which were during all that year kept and located upon the Shoshone Indian Reservation, which lies within the geographical limits of said county, and the horses and cattle of said plaintiff as kept upon said Reservation during such year were subject to taxation in said county for said year, and the said taxes so levied and assessed upon said property were not void, wrongful, or illegal for the want of jurisdiction to tax the same."

In the *State of Minnesota* v. *Mary Campbell et. al.* (53 Minn. 354,) the question again underwent an examination by the Supreme Court of the State of Minnesota. There again the authorities touching the jurisdiction of the United States upon Indian Reservations was fully discussed and considered.

The Act known as the "Five Crimes Act" was considered and there again it was determined, that while the State of Minnesota did not have jurisdiction over an *Indian* upon said Reservation, that the *laws of the state* did extend to all white persons upon such Reservations.

In *United States* v. *Ward*, (1st Woolworth 17,) Mr. Justice Miller in delivering the opinion of the court said:

"And the converse of this proposition is inferable; that is, that Congress intended to and did, cede to the new state, and it acquired and holds irrevocably except as it sees fit to surrender the same, full right and authority to legislate to enforce her laws and to exercise plenary jurisdiction over all such

parts of her Territory as were not covered by such treaties."

II.

By the Act of Congress of April 1882, which we have already cited at page....., the following language in the latter treaty made with the Indians was used:

"Third: That if at any time hereafter we as a tribe shall consent to permit cattle to be driven across our Reservation or grazed thereon, the Secretary of the Interior shall fix the amount to be paid by the parties so desiring to drive or graze cattle; all moneys arising from this source to be paid to us under such rules and regulations as the Secretary of the Interior may prescribe."

It is alleged in the complaint in this action that this complainant corporation is on the Reservation by invitation and consent of the Indians; and that the Indians have invited them there for a consideration to be paid to themselves.

This relieves the original treaty of much of the solemnity which appellant seems to consider it entitled to. It nowhere appears in any act or treaty that when the Crows consented to have cattle grazed upon this Reservation by whites, immunity from taxation and all responsibility of maintaining government should be extended over the white by reason of such act of the Indian.

The truth is, the matter now before the court rests upon the single proposition, whether the act admitting Montana into the Union as a state, was of such a character as to deprive the State of Montana of jurisdiction over white persons and their

property situate upon such Reservation which lies within her borders. It seems to us the conclusion is irresistable, that no such intent is expressed in that act, nor was any such intent present in the minds of those who passed the act providing for the admission of Montana into the Union.

As a basis of the discussion we desire to present upon this phase of the subject, we beg to quote here in full the portion or the Enabling Act which it is claimed works the result of depriving the state of jurisdiction over white persons who may be "upon any lands held by an Indian or Indian tribe."

Sec. 4, of the Act providing for the admission of Montana into the Union provides as follows:

"Said convention shall provide by ordinance irrevocable, without the consent of the United States and the people of said states * * * that the people inhabiting the said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribe; and that until the title thereto shall have been extinguished by the United States * * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * * but nothing herein, or in the said ordinances provided for, shall preclude the said states from taxing as other lands are taxed, any lands owned or held by any Indian or Indian tribe who has severed his tribal relations and has obtained from the United States, or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing provisions exempting the lands thus grant-

ed from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long, and to such extent as such Act of Congress may prescribe."

These provisions contained in the Enabling Act are found in Ordinance One of the Constitution of the State of Montana. What was intended by this provision? Was anything more intended than to conserve and preserve, the general policy of the government which Congress has for the past ten years been attempting to pursue in relation to the Indian in breaking up his tribal relations and locating him upon land in severalty?

Is there evident any purpose to deny to the state jurisdiction over its own citizens, or to cripple or destroy the power of taxation in any part of the state? There is not the least allusion to the Indian as a person, much less is there any allusion to any question of jurisdiction over white persons.

The sole matter of consideration and under discussion is the condition of *Indian lands*. The status of the Indian, so far as he is to be judged for any crime committed, is settled and determined by the Act commonly known as the "Five Crimes Act," so fully discussed in the case of Kagama. His civil status and condition when he merges into citizenship, when he becomes a possesser of property, is fully determined by the Act of Congress of March 3rd 1887, a portion of act we now quote.

Section Six of that Act at Page 390, (Laws of 1886-1887) provides as follows:

"Upon completion of said allotment and the patenting of said lands to the allottees, each and every member of the respective bands or tribes of In-

dians to whom allotments shall have been made, shall have the benefit of and be subject to the laws, both civil or criminal, of the State or Territory in which they may reside, and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; and every Indian born within the Territorial limits of the United States to whom allotments shall have been made, under the provisions of this act, or under any law or treaty, and every Indian born within the Territorial limits of the United States, who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared a citizen of the United States, and is entitled to all the rights and privileges and immunities of such citizens, whether such Indian has not been by birth or otherwise, a member of any tribe of Indians within the Territorial limits of the United States without in any manner imparing or otherwise affecting the rights of any such Indian to tribal or other property."

It is further provided by Section Four of the same Act:

"Where any Indian not residing upon a Reservation or for whose tribe no Reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled upon application to the local land office for the districts in which the lands are located, to have the same allotted to him or her, or to his or her children, in quantities and manner provided in this act for Indians residing upon Reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indian shall be adjusted upon the survey of the land so as to conform thereto, and patents shall be issued to them for such lands in

the manner and with the restrictions as herein provided."

The law now is, and has been ever since the passage of the act last quoted, that any solitary Indian may take public land not otherwise appropriated, to the extent in that act provided, and hold it the same as any white person, subject to the condition of non-alienation no matter where such public land may be.

If now we refer again to the Enabling Act, it will be observed the state disclaims all right and title to the lands lying within its limits "owned or held by *any Indian* or Indian tribes, and the jurisdiction of these are to remain in the Congress of the United States." And further in the same section it is provided:

"The lands which have been or may be granted to *any Indian* or Indians under any act of Congress and provision exempting them from taxation * * * such lands shall be exempt from taxation so long and to such extent as such act of Congress may prescribe."

The act granting land in severalty which we are considering, provides that a preliminary patent shall issue to the Indian when allotment is completed; final patent, which would extinguish the title of the government, will not be issued for twenty-five years as the law now stands, and may be further deferred if the President of the United States shall deem it best.

Suppose now allotment of the Crow Indian Reservation were completed tomorrow, where would be the jurisdiction of the Indian? He would be "subject to the laws both civil and criminal of the

state where he resides." Where would be the jurisdiction of his land? "Under the exclusive jurisdiction and the control of Congress of the United States until title thereto shall have been extinguished by the United States," which would not occur, as has been stated above, for twenty-five years.

Consider another condition which actually exists with the Cheyenne Indians. The Cheyenne Indian has taken up his residence within the County of Custer separate and apart from any tribe. He will swear every day of the year that he has "adopted the habits of civilized life." Fortunately perhaps, the act of Congress does not prescribe any particular standard of "civilized life;" but who is this Cheyenne Indian? "A citizen of the United States entitled to all the rights and privileges and immunities of such citizens," subject to all the laws of the state, both civil and criminal. He may be taxed on personal property if he have it, the same as any other citizen of the United States; only his lands are under the exclusive control of Congress and can neither be taxed or alienated. This is the scope of the Enabling Act, and the condition of admission by Congress, as we understand it.

It can scarcely be conceived that the Congress of the United States, intended by the conditions of the Enabling Act to create such a condition of things as that each tract of land occupied by each several Indian should be a distinct Reservation in such state within the exclusive jurisdiction of the United States.

It is difficult to conceive of any such aspect of the case. This construction of the Enabling Act

which we have given is perfectly consistent. Several of the states years ago had undertaken to tax the lands held by Indians notably, Kansas, as in the case of—

Kansas Indians, (5th Wall, 737.)
The New York Indians, (5th Wall, 761.)

To render the act of admission harmonious with the law as it had been adjudged, and in order that such admission might not be construed as yielding the jurisdiction and authority of Congress over lands allotted in severalty, and to maintaing them free from taxation, forfeiture or alienation for the period which might be prescribed, was the true purpose of this clause in the Enabling Act, as we understand and believe it to be.

Another consideration which strongly emphasizes the view which the State of Montana entertained in adopting the ordinance provided by the act of Congress, is the law which the State passed after coming into the Union.

By Section 40 of the Political Code it is provided:

"The sovereignty and jurisdiction of this state extends to all places within its boundaries as established by the constitution, excepting such places as are under the exclusive jurisdiction of the United States; but the extent of such jurisdiction over places that have been or may be set apart to, purchased or condemned by the United States, is qualified by the terms of such cession or the laws under which purchase or condemnation may be made."

And by Section 41 of the same Code, the Legislature of the State declared:

"That all legal process of the state, whether civ-

il or criminal, may be served upon persons and property found within any of the Military Reservations, or on any Indian Reservation, in all cases where the United States has not exclusive jurisdiction."

In discussing the matter of jurisdiction, the court below from whence this appeal comes, gave a very strong analysis of the ordinance required to be assented to by the state as a condition precedent to the admission in these words:

"Undoubtedly, in so far as concerns the government and protection of the Crow Indians, and for all purposes relating to the treaty and agreement between that tribe and the United States, the Reservation in question is within the sole and exclusive jurisdiction of the United States; but is it to be regarded without the jurisdiction of the State of Montana for all purposes? Certainly not. The people inhabiting the proposed state were required by Congress to agree, and did agree as one of the conditions of its admission into the Union, to disclaim any right or title to lands lying within the limits of the proposed state, owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, under the absolute jurisdiction and control of Congress. The people inhabiting the proposed state were required to make, and did make as one of the conditions of its admission into the Union, a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of Congress for all purposes relating to their control or disposition. The state could not tax or incumber such unappropriated public lands, or otherwise interfere with the jurisdiction and control over them reserved by the United

States, but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the state and county in which it should be found. We are unable to see any good reason why the authority of the state and its subordinate subsections, the counties, may not also include the taxation of all such personal property found within their geographical limits, although upon the Reservation in question, provided, as in this case the Indians are in no way interested in it."

III.

Another consideration; by the Enabling Act, the states admitted into the Union were to be "admitted on an equal footing with the original states." The consideration of equality of the states is fundamental in our system of government, and has been so from its foundation. This consideration of equality was certainly present in the mind of Congress when the Enabling Act was passed; not only was this principle enunciated in the title of the act, but it is fully set forth in the body of the act as well. Section Eight of the act provides:

"And thereupon * * * the proposed state shall be admitted by Congress into the Union under and by virtue of this act, on an equal footing with the original states from and after the date of said proclamation."

Consider now for a moment how far this principle of equality would be conserved by the holding at *Nisi Prius* where the injunction in this case was

originally granted, and where it was originally held that the State of Montana had no jurisdiction over white persons and their property on this Indian Reservation.

Has the Federal Court jurisdiction to punish a white man for a crime committed on another white man on the Ute Reservation in the State of Colorado? Conclusively not.

U. S. v. *Kagama, supra.*

Has the State of Minnesota jurisdiction over the White Earth Indian Reservation within that state to punish a white person for a crime committed against its laws? Certainly it has.

State of Minnesota v. *Mary Campbell, supra.*

Is the property of a white person situate on the Fort Hill Indian Reservation in Utah taxable? Beyond all question it is.

Utah Northern Railway v. *Fisher, supra.*

Is the property of white persons situate on the Gila River Indian Reservation in Arizona taxable? Beyond all question it is.

In re Phoenix & Maricopa Railway Company, supra.

Maricopa & Phoenix Railway Company v. *Arizona Territory*, (156 U. S. 347.)

To extend cases to the same import would be more tedious than difficult.

Turn now to the states of Dakota, Washington and Montana, admitted under the conditions of the Enabling Act which we have been discussing. Under the conditions contended for by appellant

would they have such rights as the other states to which allusion has been made? Certainly they have not.

Did Congress use any such terms as to indicate that it was intended to wholly exclude the jurisdiction of the state from this Reservation? Congress first included the Reservation within the Territorial limits of the Territory of Montana by the Act of 1864. Again, it included this Reservation within the state at the time the state was admitted into the Union, with a single reservation in relation to *Indian lands* and the jurisdiction of Congress over them, which we have considered before.

In *United States* v. *McBratney*, (104 U. S. 623,) the court say:

"Whenever upon the admission of a state into the Union, Congress has intended to except out of it an Indian Reservation, or the sole and exclusive jurisdiction over that Reservation, it has done so by *express words*."

And further in the same opinion the court say:

"The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indians in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal policy of the Indians."

The language last quoted indicates as clearly as anything can indicate, the extent and objects to which exclusive jurisdiction on Indian Reservations is intended to be applied by the Federal government.

In *Langford* v. *Monteith*, (102 U. S. 145,) the Supreme Court indicate how state jurisdiction over an Indian Reservation would be excluded by an act of Congress admitting the state into the Union. In that case, at page 146, the court say.

"The act for the admission of Kansas (*12 Stat. 126*,) after describing its exterior boundaries and declaring that the new state is admitted into the Union on an equal footing with the original states in all respects whatever, adds, that nothing contained in the constitution of the state shall be construed to include any Territory which by treaty with such tribe is not, without the consent of said tribe to be included within the Territorial limits or jurisdiction of any state or Territory; but all such Territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas until said tribe shall signify their assent to the President of the United States to be included within said state.

"Between the United States and the Shawnees, a treaty then existed by which the United States guaranteed that their lands should never be brought within the bounds of any state or territory, or subject to the laws thereof."

No such condition as was in the Shawnees treaty is found in the treaty with the Crows; and if it had been intended by Congress to exclude jurisdiction of the state over white persons on said Reservation, then as said in the case of McBratney, Congress would have excluded such jurisdiction by express words.

IV.

The principle of equality in taxation is so thoroughly a part of our system, the feeling that every

citizen shall bear his just proportion of taxation to sustain government is so thoroughly a conviction, that any conclusion which leads to an opposite result seems a naked travesty upon justice. Nothing which we might say for ourselves, or which we could quote from judicial authority could lend greater force to that principle here.

This complainant, and the more than one hundred others who are in like condition with them and who seek the intervention of the courts of this country, demand that they shall be in the matter of taxation a favored class; a class exempt from taxation. They demand that the benefaction which the government bestowed upon an Indian tribe shall be wrested by judicial determination to their own particular and peculiar advantage.

They seek a judicial determination which will in effect declare, that when the government granted the right of occupancy to an Indian tribe of a large extent of country, it was intended by that act to say that every white person or corporation who could crowd his property upon such Reservation should be exempt from taxation.

Much has been made in argument at all times in the discussion of this case, of the point that this corporation and others, held leases from the Indians, for grazing. Admitting that to be true, what has that to do with jurisdiction? The Indian has the right of occupancy, and the usufruct of the land. He has asked from the government and has received permission to lease the land which he occupies to white men for a consideration to be paid to himself; but has the government granted authority to the Indian to extend immunity from

taxation to everyone who thus becomes his tenant? Besides, if Congress has deprived the state of jurisdiction to tax on this Reservation, then the same inhibition extends to the public lands occupied by any and every Indian in the state; for if "the jurisdiction and control of Congress extends to the lands held by any Indian" then every such Indian occupies a distinct Reservation "under the exclusive jurisdiction and control of the Congress of the United States."

V.

We trust it will not be considered amiss to state in conclusion, a few words as to the situation of this Crow Indian Reservation in its relations to Custer County.

The Crow Reservation, as it now exists, constitutes an area of five thousand eight hundred and fifty (5,850) square miles, and three million eight hundred and forty thousand (3,840,000) acres.

The Crow Indian Reservation, the eastern boundry of which is the 107th meridan of longitude, runs through the County of Custer a distance of nearly one hundred miles south from the Yellowstone river to the Wyoming line. In all its length on its eastern boundry it is as easy for man or beast to step over this imaginary line into the Crow Indian Reservation and out of it, as it is for either to step over an imaginary line anywhere.

The number of white persons now upon the Reservation grazing cattle and other kind of stock, is something over one hundred.

The amount of property on the Reservation,

it is now impossible to state for the reason that such property has been for years secluded and secreted for the purposes of avoiding taxation. It is known to be a fact however, that one company has cattle upon the Reservation to the number of at least forty thousand.

These persons and corporations take their property from other portions of the county and state and from other states, as in the case of this appellant, upon this Reservation, and there bid defiance to the authorities of the state and the county acting as an instrumentality of the state, to tax them. By reason of this condition of things the loss of taxable property to the County within the last year alone has been reduced nearly two million of dollars, and the amount of taxes now due from persons having property upon the said Reservation, provided the County of Custer has authority to tax such property is, as nearly as can be estimated, the sum of two hundred thousand dollars.

A few persons upon the Reservation have, within the past years since 1889, recognized their obligations as citizens of the state and of the United States and have paid their taxes to the County as other taxpayers, but the great majority, fully nine-tenths of the occupants of this Reservation, resist the payment of such tax and claim exemption and immunity from taxation anywhere.

* * * *

In order to facilitate the early submission of this case under rule twenty of this court, we had proceeded in the preparation of respondent's brief up to

this point without having seen the brief of appellant, hence all that has been said in the foregoing pages was written before we had seen appellant's brief and before the case of the *United States* v. *Draper* had been decided in this court. The opinion in the latter case we have not yet been able to see If we could have examined that opinion it is entirely probable that very much that we have said in this brief on the subject of jurisdiction would have been shown by the opinion to be unnecessary and that it might have been left unsaid, but since we are not fully advised of the views expressed by the court in the Draper case, we will leave what we have said on the question of jurisdiction as it was originally prepared and written.

There are few, and but few propositions advanced in the brief of appellant in this case upon which we desire to say a few words.

I.

In order that this appellant corporation may wholly escape taxation, the clause of the federal constitution touching commerce with the Indian tribes is invoked to that end. The Indian himself does not complain, but this corporation is deeply exercised in his behalf. Under the circumstances, we more than doubt if the solicitude of the corporation for the Indian will be considered very praiseworthy or touching. However fair a judicial investigator might be, we submit that it would be impossible for him to find any legitimate connection between the constitutional clause relating to commerce with the Indians and Indian tribes and the

matter of taxing the property of this appellant corporation, but since appellant urges it as a serious contention let us examine it for a moment.

That there is a class of cases decided in this court where it is held that certain agencies of the government instituted for its own use and purposes, cannot be taxed by state or inferior municipalities, there is no doubt. Federal bonds, federal obligations and military agencies will readily occur as instances in point. The general government regulates the degree of taxation which these instrumentalities shall bear, and since from caprice or perhaps fancied necessity inferior municipalities might press the matter of taxation to the embarrassment, possibly the destruction of these agencies, the government has taken the matter of their taxation into its own hands.

The case of *Pollock* v. *Farmer's Loan & Trust Company*, apparently relied upon by appellant, was a case where this court decided that the Federal Congress was pursuing a policy in relation to the raising of revenue not in harmony with the the provisions of the federal constitution. That was all that was involved in that case. This court did not say that an income tax law could not be legally made.

Let us turn now for a moment to the examination of the contention in hand. This corporation insists that the Indians will be ruined in their commerce unless their property is totally exempt from taxation. These Indians, under stipulations with the Federal government, occupy a vast domain carved out of Territory purchased by the United States from a foreign power. Who these Indians

are, or what they may have been, whether the remnant of a people who once enjoyed a better civilization, and have now degenerated to a worse, we cannot know, nor is that knowledge necessary to a solution of the proposition in hand. They not only occupy a large domain granted to them by the Federal Government, but in addition to this the government takes annually from the substance of its people large amounts to bestow as benefactions to these Indians in the shape of annuities. When the Indians took this domain in 1864 they seemed solicitous that no white man should reside upon or pass over their Reservation. Later, in 1882 they had changed their minds upon this subject, and desired to modify their treaty so as to rent the lands which they occupied, to such persons as desired to graze cattle upon them, asking that one of the agencies of the Federal Government, to-wit, the Secretary of the Interior, should stipulate what would be a suitable price for them to receive for such grazing. The government assented to this and has acted in good faith upon it. The Indians rent the domain they occupy to whomsoever they choose. They have taken upon this Reservation millions of dollars worth of property under these grazing contracts.

The proposition now urged by this corporation is, that by reason of thus obtaining these grazing privileges from the Indians it should be exempt from any burden whatsoever in the way of taxation. If it should be conceded, which we do not concede, that this transaction was commerce with the Indians, does this corporation intend to urge that because Congress has power to regulate such

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

commerce it should exempt every person who does any business with the Indians from taxation? These Indians are not an instrumentality for the support of the General Government; they pay nothing to the government, the government depends upon them for nothing; on the contrary they are constantly the recipients of the bounty of the government for their own support and elevation.

Congress has power to regulate commerce with foreign nations, but when has it interfered with the principle of just taxation because of that power; it has power to regulate commerce among the several states, but when and where has it sought to cripple the taxing power of a state because of that fact?

Congress has power to regulate commerce with the Indian tribes and to punish the transgressor who traffics with the tribe in forbidden articles, but where is the power found in the federal constitution which permits Congress to say that the property within its borders not issued or used as a government instrumentality shall not be taxed?

Appellant at page 24 says:

"The price paid by this appellant for this privilege is approximately the same as that which would have to be paid for the same privilege to private parties."

If the privilege was obtained from private parties, would appellant be exempt from taxation? The theory of appellant seems to be, that the General Government should cripple or destroy a sovereign state in order to increase the revenues of an Indian tribe.

One difficulty with appellant's contention is, it wholly mistakes this tribe of Indians and their alleged rights, for the government of the United States and the agencies which it often employs for its own use and protection.

II.

There is very much alleged in appellant's brief which the records afford no justification for stating. It is alleged that the evidence of many things and rights which appellant asserts will be found "on file in the office of the Secretary of the Interior." We cannot dispute that the things alleged will be found where it is stated they are.

Under the fifth sub-division of appellant's brief it is contended that this case presents a clear case of taxation without representation; that "if a theft is committed of any property or cattle of appellant by *Indians* upon the Reservation, the appellant must look to the government of the United States for redress." Yes, the Indian would in that case answer in the forum of the General Government; but suppose the trespass to have been by white men, who would redress the appellant in that case? Not the government of the United States, but the State of Montana.

It is contended that the appellant receives no benefit from the State of Montana, and if compelled to pay this tax, it would amount to a sacrifice of its property without any corresponding benefit.

How little they, who sit in a law office in Washington City more than two thousand miles away

and make such assertions as these, know the actual truth. The State of Montana constantly, at its own expense, maintains a large corps of stock inspectors in Chicago, St. Paul, St. Louis and other markets where live stock is sold, to inspect brands of stock sold in such markets. At the same time the state keeps at the capital a record of the brands of every true owner of stock who chooses to record the same, so that if either strayed or stolen stock is sold in any of the markets where an inspector is maintained, the proceeds of such sale unerringly reaches the rightful owner. The amount thus distributed to the owners of stock of this character is almost past belief. So, too, there is kept at state expense a State Board of Stock Commissioners consisting of one member from each county in the state, whose duty it is to appoint stock detectives to ferret out and detect all thefts and trespasses upon live stock. These, and other like agencies for the protection of stock owners are kept and maintained by the state at the expense of the general taxpayers; and in these benefits the appellant shares as fully as any other corporation or individual stock owner in the state. Besides this, one of the evils which the appellant corporation seeks to perpetuate by this appeal, may be found in the fact that residents and citizens of Custer County, Yellowstone County and perhaps other counties of the state, either with or without permits, maintain their entire holding of stock upon this Indian Reservation, while they themselves reside in the cities or towns of the state and leave the persons whose stock is not grazing upon the Reservation to maintain the taxes which

support the state government.

III.

Much stress is laid by appellant upon the clause contained in the Act creating the Territory of Montana in 1864, to the effect that nothing in the Act should be construed "to impair the rights of person or property pertaining to the Indians in the Territory so long as such rights shall remain unextinguished by treaty * * * or to include any Territory which by treaty with any Indian tribes is not, without the consent of such tribe, to be included within the Territorial limits or jurisdiction of any state or territory."

It cannot be the purpose of appellant's counsel to insinuate by this quotation that the Crow Indian treaty contains a clause to the effect that the Reservation shall not be included within any state or territory without the consent of the Indians. This treaty contains no such clause; some treaties with Indian tribes have contained this provision, but no such provision is found in the treaty with the Crow Indians.

If counsel for appellant intends to rely upon the other portion of the clause quoted from the Act creating the Tertitory of Montana, that—

"Nothing in this Act contained shall be construed to impair the rights of persons or property pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty,"—

Then the complete answer to that is found in—

Ward v. *Race Horse*, (163 U. S. 504.)

In that case this court holds that the clause last quoted was abrogated *pro tanto* as against the Indians themselves by the admission of the Territory of Wyoming as a state. At opinion page 517 of that case it is said:

"So far as appears, the above treaty remains still in force. The position of the majority of the court is, that the admission of the Territory of Wyoming as a state, abrogated it *pro tanto* and put the power of the Indians to hunt on the unoccupied lands of the United States completely at the mercy of the State Government."

In conclusion, I have no disposition to transgress a rule of this court disapproving the discussion of the importance of the question involved before the court. This question which we are now discussing is neither more nor less important than others of a similar nature. It was long since determined, and always has been held that a party would not be released from sharing a burden of taxation which is common to all, unless an absolute necessity for it existed in the law.

We respectfully submit, that no such inexorable necessity exists in favor of appellant in this case.

Respectfully Submitted,

J. W. STREVELL,
Attorney for Respondent.

C. H. LOUD, and
T. J. PORTER,
Of Counsel.

EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 478.

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

MARY BALL CHAPPELL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

RECORD FILED MARCH 28, 1896.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 7, 1896.

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Petition.

In the Circuit Court for Baltimore County.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

To the honorable judge of the circuit court for Baltimore county:

The petition of Mary Ball Chappell respectfully showeth:

1. That her husband, Thomas C. Chappell, has in this case filed a bill for absolute divorce against her on the ground that she was insane at the time of her marriage, and has never at any time ratified said marriage in a moment of lucidity.

2. That said charges are absolutely false and preposterous, and that they are supported by allegations of conduct of this defendant occurring in England, on the high seas, in Maryland, Pennsylvania, New York, Massachusetts, and New Hampshire; which allegations are also false.

3. That this defendant is now and has been since September 25th, 1893, living apart from her said husband, owing to his fault, in the city of Boston; that she is boarding and is not living as she would be justified in living considering the fortune of her husband; that she is without means of her own excepting about $800 a year; that she is in debt, and that she is wholly destitute of means of living properly during the pendency of this suit and of defraying the costs and expenses attending the prosecution of the same.

4. That on the morning of her marriage she did release all rights in her said husband's property, but that said release was obtained by undue influence and is void, and that a suit is now pending in this court to declare the same void, and that said release, even if valid, would not affect her husband's obligation to support her and her right to an allowance for her support during this suit and for her counsel fees.

5. That her said husband is a rich man without children or other persons legally dependant upon him; that her said husband's wealth consists partly of real estate and leasehold property and partly of his interest in the Chappell Chemical Co. and other personal property; that the complainant is the reputed owner of "Ten Hills," a valuable country place in Baltimore county, where the petitioner and complainant resided during the summer of 1892 and 1893; that the complainant is also the reputed owner of large pieces of improved and unimproved land in Baltimore city and Baltimore and Anne Arundel counties; that the complainant, as the complainant alleges in his bill filed in the circuit court of Baltimore city against David Stewart, is an attorney-at-law and is also the treasurer and managing director of a corporation organized for the

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manufacture of chemicals, and owns a large number of shares of stock of the said corporation and is engaged in making large contracts and dealing in large sums of money, and that the complainant has had discounted at certain times as high as $30,000 upon his simple notes of hand without any security whatever; that the complainant in a letter dated January 31st, 1894, to Thomas I. Elliott, Esq., says: "You are aware, I presume, that I am connected with large business enterprises; considerable mercantile paper is being constantly discounted upon the strength of my business standing and credit, and Mr. Parsons may do me almost irreparable injury in this matter; he will render himself liable for thirty to forty thousand dollars damages." The said Parsons was threatening to sue the complainant for necessaries supplied to petitioner.

And the complainant, in a letter dated February 1st, 1895, hereinbelow quoted, to David Stewart, states his damages from being followed by detectives as being $30,000; that, as a matter of fact, the complainant has not been damaged at all, but his allegation that a little thing could damage him so much is equivalent to an allegation of great wealth on his part; that the petitioner believes the said Chappell to be worth about $150,000, and to have an income of about $12,000, and that he is amply able to provide for her and to pay her $5,000 a year for her support.

6. That the expenses attending the preparation of this case for trial will be very heavy, as witnesses will have to be examined in England, New Hampshire, Massachusetts, and elsewhere, as well as within this State.

7. That a very large and liberal allowance should be made to your petitioner to employ counsel, because the complainant is himself a lawyer, and because of the very offensive and troublesome character of the complainant; that it is only at great personal sacrifice that a lawyer can take a case against the complainant, and only at the risk of great trouble and annoyance outside the legitimate trouble and annoyance of actually conducting the suit; that the complainant has already not only brought a suit against one of the petitioner's solicitors (David Stewart), but has indulged in vituperation and threats, to wit:

In a letter to said David Stewart, dated January 30th, 1895, he says: "The litigation you suggest is probably instigated to a considerable degree by third parties, who will have to consider and take the consequences of their acts in this regard;" also: "In view of its contents (the contents of an antenuptial agreement) and other circumstances, the outrageous act of employing detectives to follow me for the purpose of endeavoring to discover or trump up something upon which to base an action or to extort money is a very serious matter for all concerned in it. I cannot imagine how you ever allowed yourself to do a thing to which such serious consequences are attached." In a letter to the same, dated January 31st, 1895, the complainant says: "You can inform Harry Ball" (the petitioner's brother), "with whom I presume you are conducting the correspondence, that I am not going to be bulldozed or blackmailed, and that I am seriously thinking of proceeding against him in the

United States circuit court at Boston for his connection with this affair. I shall certainly proceed against Ball in Boston if you file the bill you speak of" (being the bill for divorce). In another letter from the same to the same, dated February 1st, 1895, he says: "I presume your ideas as to what she ought to have are influenced somewhat by the fact you are trusting to a contingent percentage of the spoils as compensation. Your attempt to find me guilty of some indiscretion was for the purpose of endeavoring 'to bulldoze me' (the expression is more forcible than elegant) into signing a deed of separation and paying her an annual allowance. Your actings and doings in the matter so far have occasioned me endless annoyance and great pecuniary damage, and I lay the amount against you personally at thirty thousand dollars for the things complained of in my amended bill of complaint."

In a letter from the same to the same, dated February 2nd, 1895, the defendant says: "Harry B. Ball and Mr. Frink (the latter being the solicitor in New Hampshire of the petitioner) have been confederating in the matter for some time. She and Frink think that divorces ought to be kept on tap, as it were, to be supplied when requested, and her brother is somewhat of the same opinion, and has ends of his own in view in counselling, aiding, and abetting such proceedings, and has been confederating with the other confederators for some time in this whole affair."

In his letter to the same of January 31st, 1895, the complainant also says: "And now with regard to your personal liability in the proceedings I have instituted against you, if my view of the law is correct in this regard, and I am convinced it is, your actions and doings in the matter, at the least, are torts. If you do them by contract with a married woman no one should know better than you that such a contract is invalid. How could you collect by law a fee from her under such a contract if she refuses to pay you? It would be impossible; nothing could be clearer; therefore you cannot shield your own liability behind that of a person who cannot be your principal."

And on February 11th, 1895, in a letter from the same to the same, the complainant says: "Today I mailed you (sic) two letters, one in relation to my case against you, the other in relation to the other matter. If you file a scur-ilous (sic) answer or other proceeding regarding me I will cowhide you." And in the spring of 1894, in a letter to the petitioner, the complainant wrote the petitioner to tell her lawyer (meaning Mr. Frink) that he was a "puppy," and that he would cowhide him from one end of Beacon street to the other; that the petitioner cannot expect her solicitors to represent her without generous compensation when they are, through the character of the complainant, exposed in the legitimate performance of their duties to the danger of abuse and violence from the complainant.

8. That her said husband has already filed a bill for divorce in the circuit court of Baltimore city, which he afterwards dismissed, and in the circuit court of the United States in Boston, which is still pending, and that the petitioner is in absolute need of means to compensate her attorneys in this long, varied, complicated litigation.

9. That the petitioner has never in any way been in fault towards her husband, and that her marriage with him is in every way valid and binding, and that as late as January 31st, 1895, he speaks of her as a "married woman," as appears in his above letter to David Stewart.

Wherefore your petitioner prays your honor to pass an order requiring said Thomas C. Chappell to pay her monthly a reasonable allowance for her support, and to pay her a reasonable counsel fee.

And as in duty, &c.

MARY BALL CHAPPELL, *Petitioner.*

DAVID STEWART,
F. I. D.,
Solicitors for Petitioner.

Affidavit.

STATE OF MASSACHUSETTS, *City of Boston,* } *To wit:*

SUFFOLK, *ss:*

I hereby certify that on this 30th day of March, in the year one thousand eight hundred and ninety-five, before me, the subscriber, a notary public of the State of Massachusetts in and for the city of Boston, personally appeared Mary Ball Chappell and made oath in due form of law that the matters and facts stated in the aforegoing petition are true to the best of her knowledge and belief.

Witness my hand and official seal.

[SEAL.] EDWIN A. PHELPS,
Notary Public.

A copy of above petition was served upon the plaintiff in person; whereupon the court passed the following order:

Order.

On the aforegoing petition and affidavit it is hereby, this 3rd day of April, A. D. 1895, ordered by the circuit court for Baltimore county that Thomas C. Chappell be, and he is hereby, ordered and directed to pay:

(1.) One hundred dollars per month in advance, beginning from April 1, 1895, to Mary Ball Chappell, through her solicitors, Frank I. Duncan and David Stewart, during the continuance of this suit as alimony *pendente lite* and five hundred dollars for expenses of this suit.

(2.) One thousand dollars to said Mary Ball Chappell, through her solicitors, Frank I. Duncan and David Stewart, as counsel fees.

Unless cause to the contrary be shown on or before April 16, A. D. 1895, provided a copy of this order be served on said Thomas C. Chappell on or before April 10, A. D. 1895.

N. CHAS. BURKE.

And on April 16th the plaintiff filed his answer to petition as follows:

Answer to Petition.

In the Circuit Court for Baltimore County.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

The answer of Thomas C. Chappell to the petition of Mary Ball Chappell.

To the honorable judge of said court:

Thomas C. Chappell, reserving every manner of advantage and exception whatsoever and making no waiver, respectfully shows to this honorable court:

1. That he has filed a bill of complaint wherein he claims that the marriage is void *per se*, and prays for a decree of nullity, which decree is named in the laws of this State a decree for divorce, and that he is a citizen of the State of Maryland and the defendant is a citizen of the State of Massachusetts.

2. That he reiterates all of the charges set forth in his bill of complaint.

3. That he examined the book of account of the said defendant, Mary Ball Chappell, during the month of September, 1893, immediately prior to the time when she unwarrantably and unjustifiably left the house of the complainant (unless said marriage be void), and that said book of account contained a schedule of various stocks, bonds, and other securities derived by the said Mary from the executors of the last will and testament of her late father, Truworthy M. Ball, and an account of her annual income, and said book then showed that her annual income, accruing from said investments and paid for the twelve months immediately preceding, was $1,376, and the complainant believes that her allegation that she is without means except $800 a year is absolutely false, and that, on the contrary, the complainant believes she is possessed of valuable stock, bonds, and other securities readily convertible amounting to at least twenty thousand dollars, and that she is also tenant in common with her mother, brother, and sisters and others in very valuable realty situated in the village of New Castle, State of New Hampshire; that she is living with her mother and brother; that her mother has about forty thousand dollars in bonds, stocks, and other securities yielding an income of about $2,500 per annum; that her brother has a business yielding him several thousand dollars per annum; that her unmarried sisters have an income of about $1,500 per annum each, and her infant daughter has an income of $1,200 per annum; that the family lives at the rate of about $10,000 per annum, and live in much better style than the complainant and can afford to do so.

4. That the complainant fully released and abandoned all his

rights in all of her property in a valid deed of release, a copy of which is attached to his bill of complaint, and now he further consents to her using all of her property and the proceeds thereof to defray her costs, expenses, and counsel fees incurred in this suit.

5. That he denies that the deed of release she executed, acknowledged, and delivered on the day said marriage ceremony was performed was obtained by any undue influence whatsoever or is void; that, on the contrary, she freely and fairly entered into said contract and the same is valid, and said release of her rights in the complainant's property is also a release of all income arising from said property, and the complainant has no other income save that derived from said property and released as aforesaid, and he denies that there is any liability whatsoever on his part to support her or to make her any allowance for her support during this suit and for alimony *pendente lite* and expenses of this suit or for counsel fees, and he especially sets up and claims under said deed of release and contract a right, privilege, and immunity under art. 1st, sec. 10, of the Constitution of the United States—

"No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contract," and under the 14th amendment of said Constitution and under the laws of the United States as fully as if set out at large herein.

6. That he denies that he is the reputed owner of Ten Hills, a valuable country place in Baltimore county, and he denies he has an income of about $12,000 a year, or that he is amply able to provide for or pay her $5,000 a year for her support or pay her anything whatever, and he denies all liability on his part for payment for any such support, and denies all liability to pay her anything whatever, but said Ten Hills is his domicile, and he insists that setting out extracts of the contents of documents *in hæc verba* in her petition is contrary to the equity rules prescribed by the court of appeals of Maryland and embodied in the public general laws of the State.

7. That the said Mary, confederating with one David Stewart and others, has recently caused to be instituted against him three separate suits in equity in three distinct courts of equity in this State on the same cause of action, contrary to the law of equity jurisdiction and pleading, all of which are still unheard and undetermined, and has also filed other vexatious and harassing proceedings against him—a bill for divorce in Baltimore city and a petition for alimony *pendente lite*, expenses of suit and counsel fees, which is set down for hearing and unheard in Baltimore city, in the circuit court thereof—which have greatly and seriously interfered with his business in every respect and caused him great damage and injury and heavy pecuniary loss, and that he has instituted an action at law against said David Stewart in the superior court of Baltimore city for conspiracy on the 9th of April, 1895, a copy of the declaration therein being hereto annexed, marked Exhibit "D. S. No. 1."

8. That he insists that the extracts *in hæc verba* from some of the letters of the complainant set out in the petition is contrary to the law of equity pleading in this State and ought to be expunged, and he avers that the allegation that he alluded to Mr. Frink

as a puppy is absolutely false and he believes said Mary knew it, and that he denies that said Mary's conduct has been faultless; that, on the contrary, her conduct has been outrageous, as alleged in his bill of complaint, and, although a marriage which is void *per se* does not require a decree of the court to so declare it that it is preferable to have such a decree, and he reiterates the allegations in his bill of complaint.

9. That he is informed and believes the mother of said Mary for nine years imagined herself unable to attend to ordinary household duties and an invalid, and spent the entire time in bed, and then suddenly concluded to go to Europe, and has been strong and vigorous ever since, and the complainant believes that her said mother was a victim of hysteria, and the said Mary inherited it, and with her it takes a different form; that at one time she had a mania for being treated by physicians. Now she has a mania for engaging in legal proceedings; all of which manias she desires to indulge in at the expense of this complainant, utterly regardless of what pecuniary loss and injury she may occasion him; and this complainant insists that the deed of release and contract which in his original bill of complaint he has pleaded in bar of all liability on his part for maintenance, support, alimony *pendente lite*, or otherwise, expenses of this suit and counsel fees acts as an estoppel, and that said Mary is estopped from any right to any of them by reason of her own deed of grant aforesaid, wherein she covenants that the complainant shall stand seized of his property as free and unencumbered as if said marriage ceremony had never taken place, and wherein she releases and abandons all rights she would otherwise have acquired in the property of the complainant if said marriage had proved valid.

THOMAS C. CHAPPELL.

(Affirmation and certificate.)

* * * * * * *

Motion.

In the Circuit Court of Baltimore County.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

To the honorable judge of said court:

And now comes Thomas C. Chappell and moves this honorable court to dismiss the petition of above defendant and to re-cind the order *nisi* passed herein on the 3d day of April, 1895, upon the said petition—

Because said petition contains an unnecessary recital of documents *in hæc verba* instead of filing said documents as exhibits, and said exhibits were not so filed with the clerk of the court at the time said order was made and passed on said petition.

And because the complainant in the bill of complaint filed in this cause has specially set up and claims a right, privilege, and

immunity under the Constitution and laws of the United States, and the said order *nisi* passed in this cause is in derogation of said right, privilege, and immunity in said bill of complaint specially set up and claimed and is against said right, and the said right, privilege, and immunity specially set up and claimed as aforesaid arises under a deed of release and contract which is valid and in full force and effect, as alleged in said bill of complaint, and is a valid contract, and the plaintiff relies on art. 1st, sec. 10, of the Constitution of the United States of America, "No state shall pass any law*ing* impairing the obligation of contract," and the 14th amendment to said Constitution, "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

And, according to the terms of said contract, the property of the complainant is as free, unencumbered, and saved to him as if the marriage ceremony between the complainant and defendant had never taken place, and there is no difference in law between said property and the income which arises from it, and there is no evidence before the court that the complainant has any income other than that arising from his said property, which, under the terms of said contract, is exempt as aforesaid; and said Mary Ball Chappell is estopped by her said grant and her covenant that he shall stand seized of said property, free, clear, and exempt as aforesaid, and the said order was obtained from the court upon a false statement.

And, as alleged in the bill of complaint herein, the complainant herein resides in the State of Maryland, and the defendant herein resides in the State of Massachusetts, and both of said parties were born in the United States and are subject to the jurisdiction thereof and are citizens of the States wherein they reside as aforesaid, and this controversy is between citizens of different States as aforesaid.

THOMAS C. CHAPPELL.

And on April 25th the plaintiff filed the following petition:

Petition.

In the Circuit Court for Baltimore County. In Equity.

THOMAS C. CHAPPELL, Complainant,
vs.
MARY BALL CHAPPELL, Defendant.

To the honorable judge of said court:

The petition of Thomas C. Chappell shows to this honorable court:

I. That there is now pending, unheard and undetermined, in the circuit court of the United States for the district of Massachusetts,

in the city of Boston, State of Massachusetts, where the defendants reside, a suit on the equity side of said court, wherein your petitioner is complainant and the defendant in this cause is one of the defendants, and that said suit was instituted in said court on the 12th day of February, 1895, prior to the institution of this suit in this court.

II. That the subject-matter of said controversy is a deed of release and contract, a copy of which is annexed to the bill of complaint filed by this complainant in this cause on the 13th day of March, 1895, and the true purport and meaning and the legal effect thereof and its operation as a bar against this defendant for alimony, counsel fees, and suit money and damages against this defendant for illegally filing three suits in the State of Maryland against this complainant on said deed of release and contract and for other causes, and that the question of the validity of the marriage between the complainant and the defendant is raised in said cause.

III. That at the time this complainant instituted this suit there was pending in said court in the city of Boston a motion requiring this complainant to give security for costs therein, and his said bill filed therein was liable to be dismissed upon his failure to give such security, and said security had not then been given, but that said complainant has now given said security for costs in said suit, and has elected to try both the validity of the marriage and the validity of the deed of release and contract and the other matters depending in said cause in the said circuit court of the United States for the district of Massachusetts, and has set up a claim in said cause that said deed of release and contract is a bar against this defendant for alimony, suit money, and counsel fees.

Wherefore this complainant prays that his bill of complaint filed herein and all proceedings had thereon may be dismissed.

THOMAS C. CHAPPELL.

(Affirmation and certificate.)

On April 26th the court passed the following order:

Order.

In Circuit Court, Baltimore County.

THOMAS C. CHAPPELL, Complainant,
vs.
MARY BALL CHAPPELL, Defendant. } In Equity.

Upon the petition of Thomas C. Chappell, filed in this court on the 25th of April, 1895—

It is ordered that the defendant shows cause on or before the 11th day of May, 1895, why the prayer and motion of said petitioner should not be granted, provided the defendant or her att'y of record have notice by service of this order five days previous to said hearing.

N. CHARLES BURKE.

Service admitted.

FRANK I. DUNCAN,
Attorney for Defendant.

* * * * * * *

Answer to Motion to Dismiss.

(Filed May 18th, 1895.)

In the Circuit Court of Baltimore City.

CHAPPELL
vs.
CHAPPELL.

Answer to complainant's motion to dismiss suit.

The defendant, answering the motion of the complainant to dismiss his bill filed herein, says (1) that the complainant ought not to be allowed to dismiss his said suit without payment of costs, including counsel fees and alimony to date of dismissal; (2) that the complainant ought not to be allowed to dismiss his bill at all, (*a*) because the defendant had filed her cross-bill in this case; (*b*) because the motion is made in bad faith, and (*c*) because this is the only court which has jurisdiction to divorce the parties hereto.

And, as in duty, &c.

DAVID STEWART,
FRANK I. DUNCAN,
Solicitors for Defendant.

* * * * * * *

Opinion of Court.

(Filed June 11th, 1895.)

In the Circuit Court for Baltimore County.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

Upon the petition of plaintiff, filed April 25th, 1895, for leave to dismiss his bill of complaint.

I have examined the proceedings and considered the arguments of the respective counsel made at the hearing on Saturday last. I am of opinion that, in the condition of the case at the time of the filing of the petition, the plaintiff should not be permitted to dismiss his bill without first paying the costs of the case and a reasonable counsel fee to the attorneys for his wife. For these he is clearly liable under the well-settled law and practice of this State. Under the circumstances, I think a counsel fee of two hundred and fifty dollars would be a moderate allowance for counsel fees to the defendant's attorneys. Upon the payment of this sum and the cost of the suit, to be taxed by the clerk, leave will be granted to the plaintiff to dismiss the bill, without prejudice, however, to the defendant to institute such proceedings against the plaintiff as she may be advised is proper.

N. CHARLES BURKE.

Order of Court.

(Filed June 15th, 1895.)

In the Circuit Court for Baltimore County. In Equity.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

Upon the application of the plaintiff in this case to dismiss his bill, it is, by the court, this 15th day of June, 1895, ordered that leave be granted upon the payment by the plaintiff of the costs of the case to be taxed by the clerk, and upon the payment to the defendant's attorneys of record, David Stewart and Frank I. Duncan, the sum of two hundred and fifty dollars for counsel fees.

N. CHARLES BURKE.

Order for Appeal.

(Filed June 15th, 1895.)

In the Circuit Court for Baltimore County. In Equity.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

Mr. Fendall, clerk:

Please enter an appeal from the decretal orders in this case, dated 11th of June, 1895, and 15th of June, 1895.

THOMAS C. CHAPPELL.

* * * * * * *

Order of Court.

(Filed July 26th, 1895.)

In the Circuit Court for Baltimore County. In Equity.

CHAPPELL
vs.
CHAPPELL.

In the matter of the petition for alimony, expenses of suit, and counsel fees, argued before me on Saturday, June 8th, A. D. 1895, having considered the matter and the arguments of the respective counsel, I am of the opinion that the order for $1,000 counsel fee, $500 suit money, and $100 per month alimony hereinbefore passed should be made final unless the plaintiff shall dismiss his bill by

the time and upon the terms hereinafter limited; and it is accordingly, this 26th day of July, A. D. 1895, ordered by the court that the order *nisi* passed in this case on the 3d of April, A. D. 1895, on the defendant's petition for alimony be, and the same is hereby, made final and effective, unless the complainant shall on or before the 10th day of August, A. D. 1895, in accordance with the opinion of the court in this case, filed June 11th, A. D. 1895, dismiss his bill for divorce and pay the defendant's costs, to be taxed by the clerk, and the counsel fee therein provided for.

N. CHARLES BURKE.

* * * * * * *

Order for Appeal.

(Filed August 12th, 1895.)

In the Circuit Court for Baltimore County. In Equity.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

Mr. Bacon, clerk:

Please enter an appeal in this case from the order of the court passed July 26th, 1895, all rights under previous appeal being reserved.

THOMAS C. CHAPPELL.

* * * * * * *

Court of Appeals of Maryland, October Term, 1895.

THOMAS C. CAMPPELL
vs.
MARY BALL CAMPPELL.

Opinion. Filed January 8th, 1896.

Judge BRYAN delivered the opinion of the court:

Thomas C. Chappell filed a bill for divorce against his wife. There has been no final decree in the cause, but the complainant has nevertheless prayed three appeals. We will proceed to consider the orders of the court from which these appeals were taken and the facts upon which they are founded.

The bill alleges that the defendant was insane at the time the marriage ceremony was performed, and it charges her with cruelty of treatment, excessively vicious conduct, abandonment and desertion. The prayer of the bill is for a divorce *a vinculo*, for a decree of nullity of marriage, and for general relief. The charges in the bill are set forth with great minuteness of detail, and in a spirit vindictive and vituperative to a remarkable degree. Some of the statements are entirely irrelevant, and were evidently introduced into the bill merely for the purpose of harrassing the defendant, and wounding her feelings. The defendant in her answer abso-

lutely and positively denies every charge made against her. The bill was filed on the thirteenth day of March, 1895. The defendant was alleged to be a non-resident, and an order of publication was prayed against her. No publication was made. The defendant appeared on the third day of April, which was after the time when process for her appearance would have been returnable, if any such had been issued. She filed a petition in which she denied the charges made against her, and prayed for alimony, and an allowance for counsel fees. The court passed an order *nisi* granting the prayer of the petition, unless the complainant should show cause to the contrary. He showed cause on the sixteenth of April.

On the 25th of April, Chappell filed a petition to dismiss his bill of complaint. On the 8th of May, the defendant filed an answer and a cross-bill, incorporating both together, having previously obtained leave of the court. On the 11th of June, the court filed an opinion stating that the leave would be granted to the complainant to dismiss his bill of complaint, provided he should first pay $250 as counsel fees to the defendant's counsel, and also the costs of the suit, without prejudice, however, to the defendant's right to institute such proceedings against him as she might be advised. And on the 15th of June, an order of court was signed to this effect. The complainant appealed from the opinion and order, styling them decretal orders.

The right of a complainant under ordinary circumstances to dismiss his bill will not be denied. When, however, the dismissal would prejudice interests which have been acquired in consequence of the institution of the suit, this right is subject to a just and reasonable modification. The law does not leave a woman defenseless in a contest with her husband on the subject of a divorce. If her means are inadequate to the expenses of the litigation, the court in its discretion, may compel the husband to pay them, and also a reasonable sum for alimony during the pendency of the suit. In this case, as was natural, the defendant came promptly forward to meet and repel the reproachful charges made against her by her husband. To do this with effect she required the aid of able counsel. It was necessary for them to make preparation for the coming contest, and for this, they are entitled to compensation.

We shall see whether the husband ought to be charged with the payment of it. In the petition for alimony and counsel fees, the defendant alleges that her husband's charges against her are absolutely false and preposterous; and that the allegations of conduct on her part, intended to support these charges, are also false. She also alleges that owing to her husband's fault, she has been living apart from him since September the 25th, 1893; that she is boarding, and is not living in the manner she would be justified in living, considering the fortune of her husband, that she is without property of her own excepting about $800 a year; that she is in debt, and that she is wholly destitute of the means of living suitably during the pendency of the suit, and of defraying the costs and expenses attending her defence; that her husband is a rich man without children or other persons legally dependant upon him; that she

believes him to be worth about $150,000, and to have an income of about $12,000 a year.

Chappell in his answer showing cause against the prayer of the petition, alleges that in September, 1893, he examined the defendant's book of account, and *and* that it contained a schedule of her stocks, bonds and securities, and an account of her annual income, and that the book showed that her annual income accruing from investments for the twelve months immediately preceding September, 1893, was $1,376, and that he believes that she is possessed of stocks, bonds and other securities amounting to at least $20,000, and that she is tenant in common with her mother, brother, sister and others of very valuable realty in New Hampshire. He does not deny the allegation that he is a rich man, and that he is worth about $150,000. He does deny that he has an income of about $12,000. It was admitted that by an antenuptial contract between Chappell and his wife each had released all right and interest in the estate of the other. It is very apparent that there is a vast disparity between the ability of these parties to sustain the expense of this litigation. Chappell does not deny that he is worth about $150,000. He says that he believes that she is worth $20,000, and also has an interest in valuable real estate. He seems to found this belief principally upon an examination of an account book made in September, 1893, which contained a schedule of stocks, bonds and other securities belonging to the defendant.

The book is not produced nor called for; neither are the securities specified or described; nor were they alleged to belong to the defendant at the time of the institution of the suit, or after that time. It must be confessed that this is rather a vague and uncertain method of proving the contents of a written document. It cannot be regarded as showing sufficient cause against the distinct and positive averments of the petition. The bill of complaint narrates occurrences which are alleged to have occurred in New York, New Hampshire, Massachusetts, Maryland, Pennsylvania, England, and on a voyage across the Atlantic ocean. The expense of taking testimony on these matters will be very considerable, and will weigh heavily upon a person of moderate means. The labor imposed upon counsel in preparing and conducting such a cause would be very great, and would deserve a liberal compensation. It is but just and fair that the wife's means of defense should be equal to the means of prosecution possessed by the husband. As this result cannot be obtained from her limited resources, we think that a wise exercise of the court's discretion would require the husband to pay all the expenses of the suit, including the wife's counsel fees. And we think that this requirement ought to be enforced while the subject-matter of the suit and the parties are under the jurisdiction of the court.

We do not wish to be understood as intimating that a dismissal of the bill would excuse the complainant from his obligation to pay what the court orders to be paid; but it would interpose embarrassments and inconveniences which do not now exist. The rights which the defendant has under the order of the court originated from

the filing of the bill, and they would be greatly prejudiced if he were dismissed from the jurisdiction without making satisfaction of them by payment. Her petition alleges: "That her said husband has already filed a bill for divorce in the circuit court of Baltimore city, which he afterwards dismissed, and in the circuit court of the United States in Boston, which is still pending, and that the petitioner is in absolute need of means to compensate her attorneys in this long, varied, complicated litigation." Chappell's answer does not deny this statement. The record does not show any excuse for such repeated vexation. So far as we can see it is inspired by a spirit of animosity and oppression, which merits severe rebuke. It would be cruel to permit the expense of these suits to be thrown upon a helpless woman.

We have thought it best to express our views on the questions which have been discussed, because in the future progress of this cause the knowledge of our opinion may diminish the necessity for litigation. But we do not think that these appeals are properly before us. It is very clear that the appeal from the opinion of the court is improperly taken. Hagthorp *vs.* Hook, 1 Gill and Johnson, 309; Phillips *vs.* Pearson, 27 Maryland, 242, and other cases. The effective action of a court is by its decree, order or judgment, and not by its opinion. Neither would an appeal lie from the order passed in pursuance of the opinion. It is not final in its character; it does not terminate the litigation in the cause; it does not definitely determine the question in controversy. It simply grants leave to the complainant to dismiss his bill on conditions which he was at liberty to accept or reject. Even if it could be considered an order refusing permission to dismiss his bill (as it is not) it would not be the subject of appeal. It has been long settled that an appeal will not lie from an order refusing to quash an attachment. Baldwin *vs.* Wright, 3 Gill, 241; Mitchell *vs.* Townsend, 31 Md., 521. After the order is passed the suit is left still in progress, and capable of being further prosecuted.

The rule of this court on this subject has been frequently declared as follows: "No appeal shall be prosecuted to this court until a decision has been had in the court below, which is so far final, as to settle and conclude the rights of the party involved in the action, or denying to the party the means of further prosecution or defending the suit. When the proceedings below shall be terminated, an appeal will then lie, and all the errors of the court below, in the progress of the cause, will be proper subjects for complaint of the party, and for the correction of this court." Welch *vs.* Davis, 7 Gill, 365; Boteler *vs.* State, 7 Gill & Johnson, 109; Hazelhurst *vs.* Morris, 28 Maryland, 67. We think that these appeals ought to be dismissed.

The answer and cross-bill of the defendant demurs to many portions of the bill of complaint as irrelevant and scandalous, and denies the charges of cruel treatment, excessively vicious conduct, abandonment and desertion. It charges that the complainant has been guilty of adultery, cruel treatment of her, excessively vicious conduct towards her, and that she has been forced to leave him on

account of his conduct. It then gives a detailed statement of a long course of brutality, cruelty and indecency of a shocking kind, which it alleges that he practiced towards her.

The prayer of the cross-bill was for a divorce *a mensa et thoro*, alimony, and for a reasonable sum for support and maintenance during the pendency of the suit, and for the payment of counsel, and the necessary costs and expenses of the suit. After the complainant had appealed as above stated, the defendant obtained leave to withdraw her cross-bill, but it does not appear that she has ever withdrawn it. On the 26th of July, the court passed an order finally ratifying and confirming the *nisi* order for alimony, counsel fees and expenses of suit which had been passed on the third day of April, unless the complainant should on or before the 10th of August dismiss his bill of complaint and pay defendant's costs and the counsel fee in accordance with the court's opinion of June the 11th. On August the 12th, the complainant appealed from this order, having previously paid the costs of the suit on both sides. He entered another appeal to the same effect on the 22d of August. We think that what we have already said will show that an appeal will not lie from this order. After the passage of a final decree in a cause, all the previous interlocutory orders are open for revision in this court.

We shall dismiss all these appeals.

Appeals dismissed with costs.

And on the same day and year aforesaid, to wit, the eighth day of January, 1896, the court filed the following order, viz:

Court of Appeals of Maryland, October Term, 1895.

THOMAS C. CHAPPELL
vs.
MARY BALL CHAPPELL.

SAME
vs.
SAME, &c.

The appeals in this case, standing ready for hearing, were argued by counsel for the respective parties, and the proceedings have since been considered by the court.

It is thereupon, this eighth day of January, A. D. 1896, by the court of appeals of Maryland and by the authority thereof adjudged and ordered that the appeals from the orders of the circuit court for Baltimore county passed in this cause on the eleventh and fifteenth days of June, in the year eighteen hundred and ninety-five, and on the twenty-sixth day of July, in said year, be, and the same are hereby, dismissed with costs.

JAS. McSHERRY.
WM. SHEPARD BRYAN.
A. HUNTER BOYD.
CHARLES B. ROBERTS.
JOHN P. BRISCOE.

* * * * * * *